

HEARINGS
ON
H.R. 6406 AND H.R. 6298

REVISION OF THE LAWS GOVERNING THE U.S. COURT
OF MILITARY APPEALS AND THE APPEALS PROCESS

BEFORE THE
MILITARY PERSONNEL SUBCOMMITTEE
OF THE
COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
SECOND SESSION

FEBRUARY 7, MARCH 6, AND SEPTEMBER 23, 1980

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

69-781 O

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HER 6106 AND H.R. 6328

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(11)



HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
MILITARY PERSONNEL SUBCOMMITTEE,
Washington, D.C., Wednesday, February 7, 1980.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2247, Rayburn House Office Building, Hon. Richard C. White (chairman of the subcommittee) presiding.

Mr. WHITE. The subcommittee will come to order.

Good morning.

We welcome you here this morning for a hearing on H.R. 6406 and H.R. 6298, bills which are addressed to a revision of the laws governing the U.S. Court of Military Appeals and the appeals process itself.

H.R. 6406 is much the same as H.R. 6298 except that we have added the basic retirement provision, which, I understand, was in an earlier legislative draft in the Defense Department, but was removed in the Office of Management and Budget (OMB) White House review process. We believe the retirement provisions should be in the bill, and we will hear some of the details from our witnesses.

A number of events in the military appellate process prompt us to consider the legislative proposals before us today.

It has become clearly evident in recent years that an examination of the present structure of the Court of Military Appeals is overdue. The continuity and commendable development of the court over the earlier years in its history, I believe, are remarkable achievements in the relatively short history of the Uniform Code of Military Justice.

However, in recent years there has been turbulence in the court, especially with regard to the number of changes in its membership. I believe there is a remedy for that problem and we seek to address it, particularly in my bill jointly introduced with Mrs. Holt, which I trust will be our principal vehicle for markup.

Also, the size of the court has been of no little concern. Most serious is the situation upon a change in membership when philosophical differences between the remaining judges render the decisionmaking process most difficult. Again, we hope to remedy that situation in the legislation before us.

It has been my view, and I believe the view of the subcommittee, that the lack of certiorari to the Supreme Court has been a shortcoming that should be remedied. We trust this legislation will accomplish that purpose.

How would we remedy the problems I have outlined?

First, we would propose to increase the court membership to five, so that retirement, absences, illnesses, or resignations would not impair the court's function.

Second, we would improve the retirement system in order to attract the best possible nominations for vacancies.

Third, we would provide for certiorari to the Supreme Court, and in that endeavor we are grateful to the Committee on the Judiciary for its cooperation.

Other matters, such as removing the court from the Department of Defense, will give it independence in fact.

I believe I have covered the major points that prompt our consideration of the legislation, and we will now move to receive testimony from the distinguished list of witnesses who are present today.

Our first witness will be Robert L. Gilliat, Assistant General Counsel of Defense for Manpower, Health and Public Affairs, to be followed by the three service Judge Advocates General and the Chief Counsel of the Coast Guard, and the distinguished judges of the Court of Military Appeals, Chief Judge A. B. Fletcher and Judge William H. Cook.

[H.R. 6406 and H.R. 6298, together with related material, follow:]

96TH CONGRESS
2D SESSION

H. R. 6406

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to revise the laws governing the United States Court of Military Appeals, to provide for review of decisions of such court by the Supreme Court, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 1980

Mr. WHITE (for himself, Mr. PRICE, Mrs. HOLT, Mr. RODINO, and Mr. KASTENMEIER) introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to revise the laws governing the United States Court of Military Appeals, to provide for review of decisions of such court by the Supreme Court, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 SECTION 1. SHORT TITLE; REFERENCES TO UNIFORM CODE
2 OF MILITARY JUSTICE.

3 (a) SHORT TITLE.—This Act may be cited as the
4 “Court of Military Appeals Act of 1980”.

5 (b) REFERENCES TO UNIFORM CODE OF MILITARY
6 JUSTICE.—Whenever in this Act (except in sections 4(a) and
7 4(b)(1)) an amendment or repeal is expressed in terms of an
8 amendment to, or repeal of, a section or other provision, the
9 reference shall be considered to be made to a section or other
10 provision of chapter 47 of title 10, United States Code (the
11 Uniform Code of Military Justice).

12 SEC. 2. JURISDICTION OF THE COURTS OF MILITARY REVIEW
13 AND OF THE COURT OF MILITARY APPEALS.

14 (a) REPEAL OF MANDATORY REVIEW BY COURTS OF
15 MILITARY REVIEW OF SENTENCES AFFECTING GENERAL
16 OR FLAG OFFICERS.—Section 866(b) (article 66(b)), relating
17 to review by a Court of Military Review, is amended by
18 striking out “affects a general or flag officer or”.

19 (b) REVISION OF JURISDICTION OF COURT OF MILI-
20 TARY APPEALS.—

21 (1) IN GENERAL.—Section 867 (article 67), relat-
22 ing to the Court of Military Appeals, is amended to
23 read as follows:

1 "§ 867. Art. 67. Review by the Court of Military Appeals;
2 applications to the Supreme Court for writs
3 of certiorari

4 "(a) The United States Court of Military Appeals, in
5 accordance with subchapter XII of this chapter, shall review
6 the record in—

7 "(1) all cases in which the sentence, as affirmed
8 by a Court of Military Review, extends to death;

9 "(2) all cases reviewed by a Court of Military
10 Review which the Judge Advocate General orders sent
11 to the Court of Military Appeals for review; and

12 "(3) all cases reviewed by a Court of Military
13 Review in which, upon petition of the accused and on
14 good cause shown, the Court of Military Appeals has
15 granted a review.

16 "(b)(1) Decisions of the Court of Military Appeals are
17 subject to review by the Supreme Court by writ of certiorari
18 as provided in section 1259 of title 28. The Supreme Court
19 may not review any action of the Court of Military Appeals
20 in refusing to grant a petition for review.

21 "(2) The accused may petition the Supreme Court for a
22 writ of certiorari without prepayment of fees and costs or
23 security therefor and without filing the affidavit required by
24 section 1915(a) of title 28."

1 (2) CLERICAL AMENDMENT.—The item relating
2 to such section in the table of sections at the beginning
3 of subchapter IX is amended to read as follows:

"867. 67. Review by the Court of Military Appeals; applications to the Supreme Court for writs of certiorari."

4 (c) SAVINGS PROVISION.—The amendments made by
5 this section with respect to automatic review of a case that
6 affects a general or flag officer by a Court of Military Review
7 or the Court of Military Appeals under sections 866 and 867
8 of title 10, United States Code, shall not apply to any case
9 that affects a general or flag officer in which, before the ef-
10 fective date of this Act, charges have been preferred or other
11 official action has been taken with a view toward prosecu-
12 tion, and any such case shall be reviewed in a Court of Mili-
13 tary Review and the Court of Military Appeals in the same
14 manner and with the same effect as if such amendments had
15 not been enacted.

16 SEC. 3. UNITED STATES COURT OF MILITARY APPEALS.

17 (a) REVISION OF LAWS GOVERNING COURT OF MILI-
18 TARY APPEALS.—

19 (1) IN GENERAL.—Chapter 47 is amended by
20 adding at the end thereof the following new sub-
21 chapter:

22 "SUBCHAPTER XII—THE UNITED STATES COURT
23 OF MILITARY APPEALS

"Sec.	Art.
"941.	141. Status.
"942.	142. Jurisdiction.
"943.	143. Judges.
"944.	144. Organization.
"945.	145. Procedure.
"946.	146. Administrative provisions.
"947.	147. Retirement; survivors' annuities.

1 **"§941. Art. 141. Status**

2 "There is established under article I of the Constitution
3 of the United States a court of record known as the United
4 States Court of Military Appeals. The members of the Court
5 of Military Appeals shall be the chief judge and the judges of
6 the Court of Military Appeals.

7 **"§942. Art. 142. Jurisdiction**

8 "The Court of Military Appeals shall have such jurisdic-
9 tion as is conferred by this chapter.

10 **"§943. Art. 143. Judges**

11 "(a) The Court of Military Appeals shall be composed of
12 five members.

13 "(b) Judges of the Court of Military Appeals shall be
14 appointed from civil life by the President, by and with the
15 advice and consent of the Senate, solely on the grounds of
16 fitness to perform the duties of the office. No person may be
17 appointed to be a judge of the Court of Military Appeals
18 unless the person is appointed to that office before attaining
19 the age of 65 and is a member of the bar of a Federal court
20 or the highest court of a State.

1 “(c) The term of office of any judge of the Court of
2 Military Appeals shall expire 15 years after the judge takes
3 office.

4 “(d) Judges of the Court of Military Appeals may be
5 removed from office by the President, after notice and an
6 opportunity for public hearing, for inefficiency, for neglect of
7 duty, or for malfeasance in office, but for no other cause.

8 “(e)(1) Judges of the Court of Military Appeals shall
9 receive a salary at the same rate and in the same install-
10 ments as the judges of the United States courts of appeals.

11 “(2) Judges of the Court of Military Appeals shall re-
12 ceive travel expenses, and expenses actually incurred for sub-
13 sistence while traveling on duty away from the principal
14 office of the court, subject to the same limitations in amounts
15 as are applicable to the judges of the United States courts of
16 appeals.

17 “(f) If a judge of the Court of Military Appeals is tempo-
18 rarily unable to perform judicial duties because of illness or
19 another disability and the court informs the President that a
20 retired judge or a senior judge is not available for temporary
21 service, the President may designate a judge of the United
22 States Court of Appeals for the District of Columbia Circuit
23 to fill the office for the period of disability.

1 "§944. Art. 144. Organization

2 "(a) The Court of Military Appeals shall have a seal
3 which shall be judicially noticed.

4 "(b) The President shall from time to time designate one
5 of the judges of the Court of Military Appeals to be chief
6 judge of the court.

7 "(c) A majority of the judges of the Court of Military
8 Appeals shall constitute a quorum for the transaction of the
9 business of the court. A vacancy in the court shall not impair
10 the powers nor affect the duties of the court nor of the re-
11 maining judges of the court.

12 "(d) The principal office of the Court of Military Ap-
13 peals shall be in the District of Columbia.

14 "(e) Sessions of the Court of Military Appeals shall be
15 held in the District of Columbia, but the court may sit at any
16 other place where jurisdiction under this chapter is exercised
17 by the armed forces.

18 "(f) The chief judge of the Court of Military Appeals
19 shall have precedence and preside at any session that the
20 chief judge attends. The other judges shall have precedence
21 and preside according to the seniority of their original com-
22 missions. Judges whose commissions bear the same date
23 shall have precedence and shall preside according to seniority
24 in age.

1 "§945. Art. 145. Procedure

2 "(a) The rules of practice before the Court of Military
3 Appeals shall be prescribed by the court. So far as the court
4 considers practicable, such rules shall apply the rules of prac-
5 tice generally recognized in the appeal of criminal cases in
6 the United States courts of appeals, but may not be contrary
7 to or inconsistent with this chapter.

8 "(b) The accused has 60 days from—

9 "(1) the date on which the accused is notified of
10 the decision of a Court of Military Review, or

11 "(2) the date on which a copy of the decision of a
12 Court of Military Review is deposited with the United
13 States Postal Service for delivery to the accused by
14 certified mail addressed to the latest address listed for
15 the accused in the accused's official service record,
16 whichever is earlier, to petition the Court of Military Appeals
17 for review of such decision.

18 "(c)(1) In any case reviewed under section 867(a) of this
19 title (article 67(a)), the Court of Military Appeals may act
20 only with respect to the findings and sentence as approved by
21 the convening authority and as affirmed or set aside as incor-
22 rect in law by the Court of Military Review. In a case which
23 the Judge Advocate General orders sent to the Court of Mili-
24 tary Appeals, that action need be taken only with respect to
25 the issues raised by the Judge Advocate General. In a case

1 reviewed upon petition of the accused, that action need be
2 taken only with respect to issues specified in the grant of
3 review. The Court of Military Appeals shall take action
4 under this section only with respect to matters of law.

5 “(2) If the Court of Military Appeals sets aside the find-
6 ings and sentence, it may order a rehearing except where the
7 setting aside is based on lack of sufficient evidence in the
8 record to support the findings. If it sets aside the findings and
9 sentence and does not order a rehearing, it shall order that
10 the charges be dismissed.

11 “(2) After it has acted on a case, the Court of Military
12 Appeals may direct the Judge Advocate General to return
13 the record to the Court of Military Review for further review
14 in accordance with the decision of the court, unless there is
15 to be further review by the Supreme Court. Otherwise,
16 unless there is to be further action by the President or the
17 Secretary concerned, the Judge Advocate General shall in-
18 struct the convening authority to take action in accordance
19 with that decision. If the court has ordered a rehearing, but
20 the convening authority finds a rehearing impracticable, the
21 convening authority may dismiss the charges.

22 **“§ 946. Art. 146. Administrative provisions**

23 “(a) The Court of Military Appeals shall provide for the
24 publication of its reports in such form and manner as may be
25 best adapted for public information and use, and such author-

1 ized publication shall be competent evidence of the reports of
2 the Court of Military Appeals contained therein in all courts
3 of the United States and of the several States without any
4 further proof or authentication thereof.

5 “(b)(1) The Court of Military Appeals may appoint and
6 fix the basic pay of such employees as may be necessary to
7 enable it to execute efficiently the functions vested in it. Such
8 employees shall be appointed and such basic pay shall be
9 fixed in accordance with the provisions of title 5 governing
10 appointment and compensation in the civil service. Positions
11 in the court are excepted from the competitive service, and
12 the incumbents of such positions occupy positions in the ex-
13 cepted service.

14 “(2) Employees of the Court of Military Appeals shall
15 receive travel expenses and expenses for subsistence while
16 traveling on duty away from the principal office of the court
17 as provided in chapter 57 of title 5.

18 “(c) The Court of Military Appeals may make such ex-
19 penditures (including expenditures for personal services and
20 rent and for law books, books of reference, and periodicals) as
21 may be necessary to enable it to execute efficiently the func-
22 tions vested in it. All expenditures of the court shall be al-
23 lowed and paid, out of moneys appropriated for purposes of
24 the court, upon presentation of itemized vouchers therefor
25 signed by the certifying officer designated by the chief judge.

1 “(d)(1) The Court of Military Appeals may fix a fee, not
2 in excess of the fee charged and collected therefor by the
3 clerks of the United States courts of appeals, for comparing,
4 or for preparing and comparing, a transcript of the record or
5 for copying any record, entry, or other paper and the com-
6 parison and certification thereof. Such fee may not be
7 charged for materials requested by a person subject to this
8 chapter, or by such a person’s counsel, with respect to mate-
9 rial requested in connection with any review of a case in
10 which that person is a party.

11 “(2) All fees received by the Court of Military Appeals
12 shall be covered into the Treasury as miscellaneous receipts.

13 “(e) The Court of Military Appeals and the Judge Ad-
14 vocates General shall meet annually to make a comprehen-
15 sive survey of the operation of this chapter and shall report
16 annually to the Committees on Armed Services of the Senate
17 and House of Representatives, and to the Secretary of De-
18 fense, the Secretaries of the military departments, and the
19 Secretary of Transportation, the number and status of pend-
20 ing cases and any recommendations relating to uniformity of
21 policies as to sentences, amendments to this chapter, and any
22 other matters considered appropriate.

23 “§ 947. Art. 147. Retirement; survivors’ annuities

24 “(a)(1) A judge of the Court of Military Appeals who
25 attains the age of 70 shall be retired upon attaining such age.

1 “(2) A judge of the Court of Military Appeals who has
2 attained the age of 65 may retire at any time after serving as
3 a judge for 15 years or more.

4 “(3) A judge of the Court of Military Appeals who is not
5 reappointed following the expiration of such judge's term of
6 office may retire upon the completion of such term if—

7 “(A) the judge has served as a judge of the Court
8 of Military Appeals for 15 years or more; and

9 “(B) not earlier than 9 months preceding the date
10 of the expiration of such term of office and not later
11 than 6 months preceding such date, the judge advised
12 the President in writing that the judge was willing to
13 accept reappointment to the court.

14 “(4) A judge of the Court of Military Appeals who be-
15 comes permanently disabled from performing judicial duties
16 under this chapter shall be retired.

17 “(b)(1) If a judge of the Court of Military Appeals is
18 temporarily unable to perform judicial duties because of ill-
19 ness or another disability, or if there is a vacancy on the
20 court, the chief judge of the court may call upon any person
21 who has elected to receive retired pay under the application
22 of section 7447(e) of the Internal Revenue Code of 1954 to
23 judges of the Court of Military Appeals in accordance with
24 subsection (d) to perform such judicial duties with the court
25 as may be requested of such person for any period or periods

1 specified by the chief judge, except that in the case of any
2 such person—

3 “(A) the aggregate of such periods in any one cal-
4 endar year may not (without the person’s consent)
5 exceed 90 days; and

6 “(B) the person shall be relieved of performing
7 such duties during any period in which illness or dis-
8 ability precludes the performance of such duties.

9 “(2) Any act, or failure to act, by a person performing
10 judicial duties pursuant to paragraph (1) shall have the same
11 force and effect as if it were the act, or failure to act, of a
12 judge of the Court of Military Appeals, but any such person
13 shall not be counted as a judge of the court for purposes of
14 the first sentence of section 943(a) of this title (article
15 143(a)).

16 “(3) Any person who is performing judicial duties pursu-
17 ant to paragraph (1) shall, in lieu of retired pay, be paid the
18 same compensation as a judge and shall be paid the same
19 allowances for travel and other expenses as a judge.

20 “(c)(1) A judge of the Court of Military Appeals who
21 becomes permanently disabled from performing judicial duties
22 under this chapter shall certify to the President such disabil-
23 ity in writing. If the chief judge of the court retires for dis-
24 ability, such retirement shall not take effect until concurred
25 in by the President. If a judge other than the chief judge

1 retires for disability, such judge shall furnish to the President
2 a certificate of disability signed by the chief judge.

3 “(2) Whenever a judge who becomes permanently dis-
4 abled from performing judicial duties under this chapter does
5 not retire and the President finds that such judge is unable to
6 discharge efficiently the duties of such judge’s office by
7 reason of permanent mental or physical disability and that
8 the appointment of an additional judge is necessary for the
9 efficient conduct of the business of the court, the President
10 shall declare such judge to be retired, and on such declaration
11 such judge shall be retired.

12 “(d) The provisions of subsection (d) (relating to compu-
13 tation and payment of retired pay), subsection (e) (relating to
14 election to receive retired pay), subsection (g) (relating to co-
15 ordination with civil service retirement), and subsection (i)
16 (relating to revocation of an election to receive retired pay) of
17 section 7447 of the Internal Revenue Code of 1954 shall
18 apply to judges of the Court of Military Appeals in the same
19 manner as such provisions apply to judges of the United
20 States Tax Court.

21 “(e)(1) A person who has elected to receive retired pay
22 under the application of section 7447(e) of the Internal Reve-
23 nue Code of 1954 to judges of the Court of Military Appeals
24 in accordance with subsection (d) who thereafter—

1 “(A) accepts any civil office or employment under
2 the Government of the United States (other than the
3 performance of judicial duties pursuant to subsection
4 (b)); or

5 “(B) provides legal services to a client in a case
6 arising under this chapter;

7 shall forfeit all rights to retired pay under the application of
8 such section of the Internal Revenue Code of 1954 for all
9 periods beginning on or after the first day on which such
10 person accepts such office or employment or provides such
11 legal services.

12 “(2) Any person who has elected to receive retired pay
13 as described in paragraph (1) who thereafter during any cal-
14 endar year fails to perform judicial duties required of such
15 person under subsection (b) shall forfeit all rights to retired
16 pay under the application of such section of the Internal Rev-
17 enue Code of 1954 for the 1-year period which begins on the
18 first day on which the person so fails to perform such duties.

19 “(f) In any determination of the length of service of any
20 person as a judge of the Court of Military Appeals there shall
21 be included all periods of service (whether or not consecutive)
22 during which the person served as a judge of the Court of
23 Military Appeals under this chapter.

24 “(g)(1) Judges of the Court of Military Appeals may
25 provide annuities to their surviving spouses and dependent

1 children in the same manner and subject to the same terms
 2 and conditions as judges of the United States Tax Court pro-
 3 vide annuities to their surviving spouses and dependent chil-
 4 dren under section 7448 of the Internal Revenue Code of
 5 1954.

6 “(2) Amounts deducted and withheld from the salaries
 7 of judges of the Court of Military Appeals in the application
 8 of section 7448(c) of the Internal Revenue Code of 1954 to
 9 such judges in accordance with paragraph (1) shall be depos-
 10 ited in the Treasury to the credit of a fund to be known as
 11 the ‘Court of Military Appeals judges survivors annuity
 12 fund’.”.

13 (2) CLERICAL AMENDMENT.—The table of sub-
 14 chapters preceding subchapter I is amended by adding
 15 at the end thereof the following new item:

“XII. The United States Court of Military Appeals..... 941 141”.

16 (b) TRANSITION PROVISIONS.—

17 (1) CONTINUATION OF STATUS.—The United
 18 States Court of Military Appeals established under the
 19 amendment made by subsection (a)(1) is a continuation
 20 of the United States Court of Military Appeals as it
 21 existed before the enactment of this Act. The judges of
 22 the United States Court of Military Appeals immedi-
 23 ately before the enactment of this Act shall become the
 24 judges of the United States Court of Military Appeals

1 under section 941 (article 141) of title 10, United
2 States Code, upon the enactment of this Act. No loss
3 of rights or powers, interruption of jurisdiction, or prej-
4 udice to matters pending in the United States Court of
5 Military Appeals before the date of the enactment of
6 this Act shall result from enactment of this Act.

7 (2) **TERM OF OFFICE.**—Section 943(e) (article
8 943(e)) of title 10, United States Code, as added by
9 subsection (a)(1), shall take effect on the date of the
10 enactment of this Act, except that—

11 (A) the term of office being served by a
12 judge of the Court of Military Appeals on that
13 date shall expire (i) on the date it would have ex-
14 pired under the law in effect on the day before
15 such date of enactment, or (ii) 10 years after the
16 date on which the judge took office as a judge of
17 the Court of Military Appeals, whichever is later;

18 (B) with respect to appointments to vacan-
19 cies on the Court of Military Appeals that exist
20 on the date of the enactment of this Act, the
21 President shall designate one nominee for such an
22 appointment, at the time of the nomination, for a
23 term of office to expire 12 years after the judge
24 takes office; and

1 (C) any judge of the Court of Military Ap-
2 peals on the date of the enactment of this Act and
3 any judge appointed under paragraph (2) for a
4 term of 12 years may be reappointed in the same
5 manner as a judge of the Court of Military Ap-
6 peals appointed under section 943(b)(1) (article
7 143(b)(1)) of such title, as added by subsection
8 (a)(1).

9 (3) EMPLOYEES.—Nothing contained in the
10 amendments made by this Act shall be construed to
11 deprive any individual who on the date of the enact-
12 ment of this Act is an officer or employee of the
13 United States Court of Military Appeals of any rights,
14 privileges, or civil service status, if any, to which such
15 individual is entitled under the laws of the United
16 States and regulations prescribed under such laws.

17 (4) SENIOR JUDGES.—

18 (A) Any individual who is a senior judge of
19 the United States Court of Military Appeals on
20 the date of the enactment of this Act and who is
21 not receiving retired pay under the application of
22 section 7447(e) of the Internal Revenue Code of
23 1954 to judges of the Court of Military Appeals
24 in accordance with section 947(d) (article 947(d))
25 of title 10, United States Code, as added by sub-

1 section (a)(1), may be assigned offices in a Federal
2 building and may be provided with a staff assist-
3 ant, whose compensation may not exceed the
4 highest rate prescribed for grade GS-9 of the
5 General Schedule under section 5332 of title 5.

6 (B) If a judge of the United States Court of
7 Military Appeals is temporarily unable to perform
8 judicial duties because of illness or another dis-
9 ability, or if there is a vacancy on the court, the
10 chief judge of the court may call upon a senior
11 judge, with the consent of the senior judge, to
12 perform judicial duties with the court for the du-
13 ration of the disability or vacancy. Any act, or
14 failure to act, by an individual performing judicial
15 duties pursuant to this subparagraph shall have
16 the same force and effect as if it were the act (or
17 failure to act) of a judge of the United States
18 Court of Military Appeals, but such individual
19 shall not be counted as a judge of the Court of
20 Military Appeals for the purposes of the first sen-
21 tence of section 943(a) (article 143(a)) of title 10,
22 United States Code, as added by subsection (a)(1).
23 Any individual performing such judicial duties
24 pursuant to this subparagraph shall, in lieu of re-
25 tired pay, be paid the same compensation as a

1 judge of such court and shall be paid the same
2 allowances for travel and other expenses as a
3 judge of such court.

4 (5) RETIREMENT.—Section 947(a) (article 147(a))
5 of title 10, United States Code, as added by subsection
6 (a)(1), shall take effect on the date of the enactment of
7 this Act, except that the term “10 years or more” ap-
8 plies in such section in place of the term “15 years or
9 more” with respect to—

10 (A) a judge who is a judge of the Court of
11 Military Appeals on the date of the enactment of
12 this Act; or

13 (B) a judge who is appointed for a term of
14 12 years under paragraph (2)(B).

15 SEC. 4. SUPREME COURT REVIEW.

16 (a) ESTABLISHMENT OF REVIEW BY THE SUPREME
17 COURT OF CASES REVIEWED BY THE COURT OF MILITARY
18 APPEALS.—

19 (1) IN GENERAL.—Chapter 81 of title 28, United
20 States Code, is amended by adding at the end thereof
21 the following new section:

22 “§ 1259. Court of Military Appeals; certiorari

23 “Decisions of the United States Court of Military Ap-
24 peals may be reviewed by the Supreme Court by writ of cer-
25 tiorari in the following cases:

1 “(1) Cases reviewed by the Court of Military Ap-
2 peals under section 867(a)(1) of title 10.

3 “(2) Cases certified to the Court of Military Ap-
4 peals by the Judge Advocate General under section
5 867(a)(2) of title 10.

6 “(3) Cases in which the Court of Military Appeals
7 granted a petition for review under section 867(a)(3) of
8 title 10.

9 “(4) Cases, other than those described in para-
10 graphs (1), (2), and (3) of this subsection, in which the
11 Court of Military Appeals granted relief.”

12 (2) CLERICAL AMENDMENT.—The table of sec-
13 tions at the beginning of chapter 81 of such title is
14 amended by adding at the end thereof the following
15 new item:

“1259. Court of Military Appeals; certiorari.”

16 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

17 (1) TIME FOR APPLICATION FOR WRIT OF CER-
18 TIORARI.—Section 2101 of title 28, United States
19 Code, is amended by adding at the end thereof the fol-
20 lowing new subsection:

21 “(g) The time for application for a writ of certiorari to
22 review a decision of the United States Court of Military Ap-
23 peals shall be as prescribed by rules of the Supreme Court.”

1 (2) FINALITY OF ACTIONS OF COURTS OF MILI-
 2 TARY REVIEW.—Subsection (e) of section 866 (article
 3 66), relating to the Courts of Military Review, is
 4 amended—

5 (A) by striking out "or"; and

6 (B) by inserting "or the Supreme Court,"
 7 after "Appeals".

8 (3) APPELLATE COUNSEL IN APPEALS TO SU-
 9 PREME COURT.—

10 (A) Subsection (b) of section 870 (article 70),
 11 relating to appellate counsel, is amended by
 12 adding at the end thereof the following new sen-
 13 tence: "Appellate Government counsel may repre-
 14 sent the United States before the Supreme Court
 15 in cases arising under this chapter when requested
 16 to do so by the Attorney General."

17 (B) Subsection (c) of such section is amended
 18 to read as follows:

19 "(c) Appellate defense counsel shall represent the ac-
 20 cused before the Court of Military Review, the Court of Mili-
 21 tary Appeals, or the Supreme Court—

22 "(1) when requested by the accused;

23 "(2) when the United States is represented by
 24 counsel; or

1 “(3) when the Judge Advocate General has sent
2 the case to the Court of Military Appeals.”.

3 (C) Subsection (d) of such section is
4 amended—

5 (i) by striking out “or” and inserting in
6 lieu thereof a comma; and

7 (ii) by inserting “, or the Supreme
8 Court” after “Review”.

96TH CONGRESS
2D SESSION

H. R. 6298

To amend the Uniform Code of Military Justice to establish the United States Court of Military Appeals as an independent court under article I of the Constitution of the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 24, 1980

Mr. PRICE (for himself and Mr. BOB WILSON) (by request) introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend the Uniform Code of Military Justice to establish the United States Court of Military Appeals as an independent court under article I of the Constitution of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE; REFERENCES TO UNIFORM CODE
4 OF MILITARY JUSTICE.

5 (a) SHORT TITLE.—This Act may be cited as the “Mili-
6 tary Appellate Procedures Act of 1980”.

(b) REFERENCES TO UNIFORM CODE OF MILITARY

JUSTICE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

SEC. 2. JURISDICTION OF THE COURTS OF MILITARY REVIEW
AND OF THE COURT OF MILITARY APPEALS.

(a) JURISDICTION OF COURTS OF MILITARY REVIEW.—Section 866(b) (article 66(b)), relating to review by a Court of Military Review, is amended by striking out “affects a general or flag officer or”.

(b) JURISDICTION OF COURT OF MILITARY APPEALS.—Section 867 (article 67), relating to the Court of Military Appeals, is amended to read as follows:

“§ 867. Art. 67. Review by the Court of Military Appeals

“(a) The United States Court of Military Appeals, in accordance with subchapter XII of this chapter, shall review the record in—

“(1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

“(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

1 “(3) all cases reviewed by a Court of Military
2 Review in which, upon petition of the accused and on
3 good cause shown, the Court of Military Appeals has
4 granted a review.

5 “(b) Decisions of the Court of Military Appeals are sub-
6 ject to review in the Supreme Court as provided in section
7 1259 of title 28.”.

8 (c) SAVINGS PROVISION.—The amendments made by
9 this section with respect to automatic review of a case that
10 affects a general or flag officer by a Court of Military Review
11 or the Court of Military Appeals under sections 866 and 867
12 of title 10, United State Code, shall not apply to any case
13 that affects a general or flag officer in which, before the ef-
14 fective date of this Act, charges have been preferred or other
15 official action has been taken with a view to prosecution, and
16 any such case shall be reviewed in a Court of Military Re-
17 view and the Court of Military Appeals in the same manner
18 and with the same effect as if such amendments had not been
19 enacted.

20 SEC. 3. UNITED STATES COURT OF MILITARY APPEALS.

21 (a) ENACTMENT OF NEW SUBCHAPTER OF CODE.—

22 (1) Chapter 47 is amended by adding at the end
23 thereof the following new subchapter:

"SUBCHAPTER XII—THE UNITED STATES**COURT OF MILITARY APPEALS**

"Sec.	Art.
"941.	141. Status.
"942.	142. Jurisdiction.
"943.	143. Membership.
"944.	144. Organization.
"945.	145. Procedure.
"946.	146. Administrative Provisions.

"§ 941. Art. 141. Status

"There is established under article I of the Constitution of the United States a court of record known as the United States Court of Military Appeals. The members of the Court of Military Appeals shall be the chief judge and the judges of the Court of Military Appeals.

"§ 942. Art. 142. Jurisdiction

"The Court of Military Appeals shall have such jurisdiction as is conferred by this chapter.

"§ 943. Art. 143. Membership

"(a) The Court of Military Appeals shall be composed of five members.

"(b)(1) Judges of the Court of Military Appeals shall be appointed from civil life by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. No individual shall be appointed to be a judge of the Court of Military Appeals unless the individual is appointed to that office before attaining the age of sixty-five and is a member of the bar of a Federal court or the highest court of a State.

1 “(2) If a judge of the Court of Military Appeals is un-
2 able temporarily to perform judicial duties because of illness
3 or another disability and the Court of Military Appeals in-
4 forms the President that a senior judge is not available for
5 temporary service under subsection (g), the President may
6 designate a judge of the United States Court of Appeals for
7 the District of Columbia Circuit to fill the office for the period
8 of disability.

9 “(c) Each judge shall receive salary at the same rate
10 and in the same installments as the judges of the United
11 States courts of appeals.

12 “(d) Judges of the Court of Military Appeals shall re-
13 ceive necessary traveling expenses, and expenses actually in-
14 curred for subsistence while traveling on duty and away from
15 their designated stations, subject to the same limitations in
16 amounts as are applicable to the United States courts of ap-
17 peals.

18 “(e) The term of office of any judge of the Court of
19 Military Appeals shall expire fifteen years after the judge
20 takes office.

21 “(f) Judges of the Court of Military Appeals may be
22 removed from office by the President, after notice and an
23 opportunity for public hearing, for neglect of duty, for malfea-
24 sance in office, or for mental or physical disability, but for no
25 other cause.

“(g)(1) Any judge of the United States Court of Military Appeals who is receiving retired pay may become a senior judge, may occupy offices in a Federal building, and may be provided with a staff assistant whose compensation shall not exceed the rate prescribed for grade GS-9 of the General Schedule under section 5332 of title 5.

“(2) If a judge of the Court of Military Appeals is unable temporarily to perform judicial duties because of illness or another disability, or if there is a vacancy on the Court of Military Appeals, the chief judge may call upon a senior judge, with the consent of the senior judge, to perform judicial duties with the Court of Military Appeals for the period of the disability or vacancy. A senior judge who is performing judicial duties under this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

“§944. Art. 144. Organization

“(a) The Court of Military Appeals shall have a seal which shall be judicially noticed.

“(b) The President shall designate from time to time one of the judges to act as chief judge.

“(c) A majority of the judges of the Court of Military Appeals shall constitute a quorum for the transaction of the business of the Court of Military Appeals. A vacancy in the Court of Military Appeals shall not impair the powers nor

1 affect the duties of the Court of Military Appeals nor of the
2 remaining judges of the Court of Military Appeals.

3 “(d) The principal office of the Court of Military Ap-
4 peals shall be in the District of Columbia, but the Court of
5 Military Appeals may sit at any place where jurisdiction
6 under this chapter is exercised by the armed forces.

7 “(e) The sessions of the Court of Military Appeals shall
8 be held in the District of Columbia, but the chief judge may
9 authorize the Court of Military Appeals to sit elsewhere if
10 necessary to secure the expeditious disposition of cases under
11 this chapter.

12 “(f) The chief judge of the Court of Military Appeals
13 shall have precedence and preside at any session that the
14 chief judge attends. The other judges shall have precedence
15 and preside according to the seniority of their commissions.
16 Judges whose commissions bear the same date shall have
17 precedence and shall preside according to seniority in age.

18 **“§ 945. Art. 145. Procedure**

19 “(a) The rules of practice before the Court of Military
20 Appeals may be prescribed by the Court of Military Appeals.
21 So far as the Court of Military Appeals considers practicable,
22 such rules shall apply the rules of practice generally recog-
23 nized in the appeal of criminal cases in the United States
24 courts of appeals, but may not be contrary to or inconsistent
25 with this chapter.

1 “(b) The accused has sixty days from—

2 “(1) the date on which the accused is notified of
3 the decision of a Court of Military Review, or

4 “(2) the date on which a copy of the decision of a
5 Court of Military Review is deposited with the United
6 States Postal Service for delivery to the accused by
7 certified mail addressed to the latest address listed for
8 the accused in the accused's official service record,

9 whichever is earlier, to petition the Court of Military Appeals
10 for review.

11 “(c)(1) In any case reviewed under section 867(a) of this
12 title (article 67(a)), the Court of Military Appeals may act
13 only with respect to the findings and sentence as approved by
14 the convening authority and as affirmed or set aside as incor-
15 rect in law by the Court of Military Review. In a case which
16 the Judge Advocate General orders sent to the Court of Mili-
17 tary Appeals, that action need be taken only with respect to
18 the issues raised by the Judge Advocate General. In a case
19 reviewed upon petition of the accused, that action need be
20 taken only with respect to issues specified in the grant of
21 review. The Court of Military Appeals shall take action
22 under this section only with respect to matters of law.

23 “(2) If the Court of Military Appeals sets aside the find-
24 ings and sentence, it may order a rehearing except where the
25 setting aside is based on lack of sufficient evidence in the

1 record to support the findings. If it sets aside the findings and
2 sentence and does not order a rehearing, it shall order that
3 the charges be dismissed.

4 “(3) After it has acted on a case, the Court of Military
5 Appeals may direct the Judge Advocate General to return
6 the record to the Court of Military Review for further review
7 in accordance with the decision of the court unless there is to
8 be further review by the Supreme Court. Otherwise, unless
9 there is to be further action by the President or the Secretary
10 concerned, the Judge Advocate General shall instruct the
11 convening authority to take action in accordance with that
12 decision. If the court has ordered a rehearing, but the con-
13 vening authority finds a rehearing impracticable, the conven-
14 ing authority may dismiss the charges.

15 “§ 946. Art. 146. Administrative Provisions

16 “(a) The Court of Military Appeals shall provide for the
17 publication of its reports in such form and manner as may be
18 best adapted for public information and use, and such author-
19 ized publication shall be competent evidence of the reports of
20 the Court of Military Appeals contained therein in all courts
21 of the United States and of the several States without any
22 further proof or authentication thereof.

23 “(b)(1) The Court of Military Appeals may appoint and
24 fix the basic pay of such employees as may be necessary
25 efficiently to execute the functions vested in the Court of

1 Military Appeals under the provisions of title 5 governing
2 appointment and compensation in the civil service. Positions
3 in the Court of Military Appeals are excepted from the com-
4 petitive service, and the incumbents of such positions occupy
5 positions in the excepted service.

6 “(2) The employees of the Court of Military Appeals
7 shall receive their necessary traveling expenses, and ex-
8 penses for subsistence while traveling on duty and away from
9 their designated stations, as provided in chapter 57 of title 5.

10 “(c) The Court of Military Appeals may make such ex-
11 penditures (including expenditures for personal services and
12 rent at the seat of Government and elsewhere and for law
13 books, books of reference, and periodicals) as may be neces-
14 sary efficiently to execute the functions vested in the Court of
15 Military Appeals. All expenditures of the Court of Military
16 Appeals shall be allowed and paid, out of any moneys appro-
17 priated for purposes of the Court of Military Appeals, upon
18 presentation of itemized vouchers therefor signed by the cer-
19 tifying officer designated by the chief judge.

20 “(d) The Court of Military Appeals may fix a fee, not in
21 excess of the fee charged and collected therefor by the clerks
22 of the United States courts of appeals, for comparing, or for
23 preparing and comparing, a transcript of the record, or for
24 copying any record, entry, or other paper and the comparison
25 and certification thereof. Such fee shall not be charged for

1 materials requested by a person subject to this chapter, or by
 2 the person's counsel, with respect to material requested in
 3 connection with any review of a case in which that person is
 4 a party.

5 “(e) All fees received by the Court of Military Appeals
 6 shall be covered into the Treasury as miscellaneous receipts.

7 “(f) The Court of Military Appeals and the Judge Advo-
 8 cates General shall meet annually to make a comprehensive
 9 survey of the operation of this chapter and shall report annu-
 10 ally to the Committees on Armed Services of the Senate and
 11 the House of Representatives and to the Secretary of De-
 12 fense, the Secretaries of the military departments, and the
 13 Secretary of Transportation, the number and status of pend-
 14 ing cases and any recommendations relating to uniformity of
 15 policies as to sentences, amendments to this chapter, and any
 16 other matters considered appropriate.”.

17 (2) The table of subchapters preceding subchapter
 18 I is amended by adding at the end thereof the follow-
 19 ing new item:

“XII. The United States Court of Military Appeals..... 941 141”.

20 (b) TRANSITION PROVISIONS.—

21 (1) CONTINUATION OF STATUS.—The United
 22 States Court of Military Appeals established under the
 23 amendment made by subsection (a)(1) is a continuation
 24 of the United States Court of Military Appeals as it

1 existed before the date of the enactment of this Act.

2 The judges of the United States Court of Military Ap-
3 peals immediately before the date of the enactment of
4 this Act shall become the judges of the United States
5 Court of Military Appeals under section 941 (article
6 141) of title 10, United States Code, upon the enact-
7 ment of this Act. No loss of rights or powers, interrup-
8 tion of jurisdiction, or prejudice to matters pending in
9 the United States Court of Military Appeals before the
10 date of the enactment of this Act shall result from en-
11 actment of this Act.

12 (2) **TERM OF OFFICE.**—Section 943(e) (article
13 143(e)) of title 10, United States Code, as added by
14 subsection (a)(1), shall take effect on the date of the
15 enactment of this Act, except that—

16 (A) the term of office being served by a
17 judge of the Court of Military Appeals on that
18 date shall expire (i) on the date it would have ex-
19 pired under the law in effect on the day before
20 such date of enactment, or (ii) ten years after the
21 date on which the judge took office as a judge of
22 the Court of Military Appeals, whichever is later;

23 (B) with respect to appointments to vacan-
24 cies on the Court of Military Appeals that exist
25 on the date of the enactment of this Act, the

1 President shall designate one nominee for such an
2 appointment, at the time of the nomination, for a
3 term of office to expire twelve years after the
4 judge takes office; and

5 (C) a judge of the Court of Military Appeals
6 on the date of the enactment of this Act and a
7 judge subsequently appointed for a term of twelve
8 years may be reappointed in the same manner as
9 a judge of the Court of Military Appeals appoint-
10 ed under section 943(b)(1) (article 143(b)(1)) of
11 such title, as added by subsection (a)(1).

12 (3) EMPLOYEES.—Section 946(b) (article 146(b))
13 of title 10, United States Code, as added by subsection
14 (a)(1), shall take effect on the date of the enactment of
15 this Act, except that an employee of the United States
16 Court of Military Appeals who is on the rolls of the
17 United States Court of Military Appeals and is in the
18 competitive service or the senior executive service on
19 that date shall continue to remain in such service as
20 long as the person remains on the rolls of the Court of
21 Military Appeals in the competitive service or the se-
22 nior executive service without a break in service of
23 more than three days.

1 SEC. 4. SUPREME COURT REVIEW.

2 (a) SUPREME COURT REVIEW.—Chapter 81 of title 28,
3 United States Code, is amended by adding at the end thereof
4 the following new section:

5 "§ 1259. Court of Military Appeals; certiorari

6 "The Supreme Court may review by writ of certiorari—

7 "(1) cases reviewed by the Court of Military Ap-
8 peals under section 867(a)(1) of title 10;

9 "(2) issues certified to the Court of Military Ap-
10 peals by the Judge Advocate General and other issues
11 upon which the Court of Military Appeals took action
12 in cases reviewed under section 867(a)(2) of title 10;

13 "(3) issues upon which the Court of Military Ap-
14 peals granted review and other issues upon which the
15 Court of Military Appeals took action in cases in which
16 a petition for review was granted under section
17 867(a)(3) of title 10, except that the Supreme Court
18 may not review the action of the Court of Military Ap-
19 peals in refusing to grant a petition for review; and

20 "(4) issues upon which the Court of Military Ap-
21 peals otherwise granted relief."

22 (b) CLERICAL AMENDMENT.—The table of sections at
23 the beginning of chapter 81 of such title is amended by add-
24 ing at the end thereof the following new item:

"1259. Court of Military Appeals; certiorari."

1 (c) TECHNICAL AMENDMENTS.—Subsection (e) of sec-
2 tion 866 (article 66), relating to the Courts of Military
3 Review, is amended—

4 (1) by striking out “or”; and

5 (2) by inserting “or the Supreme Court,” after
6 “Appeals”.

7 (d) APPELLATE COUNSEL.—

8 (1) Subsection (b) of section 870 (article 70), re-
9 lating to appellate counsel, is amended by adding at
10 the end thereof the following new sentence: “Appellate
11 Government counsel may represent the United States
12 before the Supreme Court in cases arising under this
13 chapter when requested to do so by the Attorney
14 General.”.

15 (2) Subsection (c) of such section is amended—

16 (A) by striking out “or” the first place it ap-
17 pears and inserting in lieu thereof a comma; and

18 (B) by inserting “, or the Supreme Court”
19 after “Appeals” the first place it appears.

20 (3) Subsection (d) of such section is amended—

21 (A) by striking out “or” and inserting in lieu
22 thereof a comma; and

23 (B) by inserting “, or the Supreme Court”
24 after “Review”.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

JAN 2 1980

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D. C. 20515

Mr. Speaker:

There is forwarded herewith a draft of proposed legislation to establish the United States Court of Military Appeals as an independent court under article I of the Constitution of the United States, and for other purposes" and a sectional analysis thereof. It is proposed to cite this act as the "Military Appellate Procedures Act of 1979".

The proposal is part of the Department of Defense legislative program for the 96th Congress. The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this proposal for the consideration of the Congress. It is recommended that the proposal be acted by the Congress.

Purpose of the Legislation

The purpose of the legislation is to improve the appellate process in the court-martial system by enhancing the stature of the Court of Military Appeals. The Court of Military Appeals was created by Congress in 1951 as a result of enactment of the Uniform Code of Military Justice. The Court is empowered to review cases arising under the Uniform Code of Military Justice in which there is a sentence of death, a punitive discharge, confinement for one year or more, and in certain other cases. The Court has a significant impact on the operation of the court-martial system, the state of discipline in the armed forces, and the rights of servicemembers.

The Court consists of three members, appointed from civilian life by the President with the advice and consent of the Senate. No more than two of the judges may be from the same political party. Each seat on the Court carries a fifteen year term. If a vacancy develops within a fifteen year term, the successor appointed to that seat fills only the remaining balance of the term. The Court is dependent

upon the Department of Defense for administrative support. The judges are eligible for civil service retirement if they meet the requirements of the civil service laws. The judges are compensated at the same rate as the judges of the circuit courts.

In recent years, membership on the Court has been characterized by considerable turnover. During the past ten years, eight different judges have held the Court's three seats. Within a four year period, there were seven judges who sat at various times in nine different combinations. Only two of the vacancies during the past decade resulted from illness or death, suggesting that there are fundamental problems with the Court that are causing this turnover. A member of the Court recently resigned to accept a federal district court judgeship. This marks the second time within the past six years that a member of this appellate court has departed to accept an appointment to the federal trial bench. Such turnover on a three-member court has introduced substantial instability and unpredictability into the military justice system. The result has been to create a situation of uncertainty in the law that presents substantial problems for both the government and the accused.

A further difficulty with the current system is that the appellate process is not subject to direct review in the Supreme Court. At present, court-martial convictions are reviewed in the federal courts only through collateral proceedings such as a petition for habeas corpus filed in the federal district courts by the accused. There is no statutory authority for decisions of the Court of Military Appeals adverse to the government to be reviewed in the federal courts.

For the accused, the absence of direct review by the federal courts leads to "a judicial trek that has been criticized as inefficient, costly, time-consuming, and redundant." 1/ If, for example, the accused in a general court-martial receives a sentence that includes a punitive discharge, there is legal review by a judge advocate in the field, automatic appeal to a Court of Military Review, and the opportunity to petition for review by the Court of Military Appeals. The accused then is faced with a complex array of options for mounting collateral attack in which the opportunity for obtaining review and the scope of review can differ considerably depending on the court in which review is sought and the nature of the remedy sought. The doctrine of exhaustion of remedies may require the accused to pursue further actions in the military system prior to obtaining review in a federal district court. Even if relief is obtained at the district court level, there is the likelihood of further review by a court of appeals. The

1/ H. Moyer, JUSTICE AND THE MILITARY 1182 (1972)

situation is complicated by the procedural aspects of federal court review. Moreover, the substantive treatment of the case may vary not only among the courts of appeal but also within particular circuits.

For the government, on the other hand, there are no complex choices to be made. If there is a determination adverse to the government in the Court of Military Appeals, there is no other tribunal to which the government can appeal. This leaves the government at a very substantial disadvantage. The absence of direct review in an Article III court is of particular concern because of the nature of the issues decided adversely to the government by the Court of Military Appeals can have a substantial effect on the state of discipline in the armed forces.

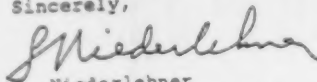
As a result of these issues, the Department of Defense conducted an extensive study of the military appellate process. The enclosed legislative proposal contains reforms that are designed to enhance the stature of the court and bring stability to its membership. The key provisions include:

- An increase in the size of the Court to five members to bring greater stability to the Court and reduce the impact of any turnover;
- Full fifteen year terms for each appointee to reduce the amount of personnel turbulence;
- Discretionary review of decisions of the Court of Military Appeals by the Supreme Court through writs of certiorari.

Cost and Budget Data

Enactment of the legislation will not have an appreciable impact on the budget of the Department of Defense. There will be an additional cost in terms of salary and support costs of approximately \$300,000 per year. It is recommended that the proposed legislation be enacted by the Congress.

Sincerely,



L. Niederlehner
Acting General Counsel

Subject	Present Law	H.R. 6298	H.R. 6406
1. Status	1. The Court is established under Article I of the Constitution and located for administrative purposes only in the Department of Defense. Art. 67(a)(1), UCMJ.	1. Similar to present law, but the reference to the Department of Defense is deleted. Art. 141, as proposed. Sec. 3(b)(1) of the bill contains a transitional provision insuring continuation of the Court as an entity with no pre-judice to pending matters.	1. Similar to H.R. 6298.
2. Jurisdiction of the Courts of Military Review.	2. Each service has a Court of Military Review, which reviews cases in which the sentence extends to death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable or bad-conduct discharge; or confinement for one year or more. In addition, these courts review all other cases that affect a flag or general officer regardless of severity of sentence. Art. 66(b), UCMJ.	2. Similar to present law, but the provision for automatic review of all general or flag officer cases regardless of severity of sentence is deleted. The amendment is set forth in sec. 12(a) of the bill, and sec. 2(c) contains a transitional provision preserving automatic review in all flag and general officer cases commenced prior to enactment of the bill.	2. Similar to H.R. 6298.
3. Jurisdiction of the Court of Military Appeals.	3. Review is mandatory in all cases that extend to death or affect a flag or general officer. The Judge Advocate General may certify to the Court any case reviewed by a Court of Military Review. The Court has discretion to review any other case reviewed by a Court of Military Review upon petition of the accused. Art. 67(b), UCMJ.	3. Similar to present law, but the provision for automatic review of all flag or general officer cases regardless of severity is deleted in sec. 2(b) of the bill, and sec. 2(c) contains a transitional provision preserving such review in cases commenced prior to enactment of the bill.	3. Similar to H.R. 6298.
4. Membership	4. The Court has three Judges. Art. 67(a)(1), UCMJ.	4. The Court has five Judges. Art. 143(a) as proposed.	4. Similar to H.R. 6298.

5. Appointment.
5. Judges are appointed by the President, subject to Senate confirmation. Each appointee must come from civilian life, must be a member of the bar, and no more than two may be members of the same political party. Art. 67(a)(1), UCMJ.
6. Term of office.
6. Each seat carries a 15 year term. If there is a vacancy before the end of a 15 year term, the successor serves only the remaining balance of the term. Art. 67(a)(1), UCMJ.
7. Removal.
7. Judges may be removed by the President after notice and an opportunity for a hearing for neglect of duty or malfeasance in office, or mental or physical disability. Art. 67(a)(2), UCMJ.
8. Salary
8. Judges receive the same salary as judges of the U.S. courts of appeals. Art. 67(a)(1).
9. Travel Allowances.
9. Judges receive the same travel allowances as judges of the U.S. courts of appeals. Art. 67(a)(1).
5. Similar to present law, the political qualifications test is replaced by the requirement that appointment be made solely on the grounds of fitness to perform the duties of the office. A person must be appointed to the court before reaching the age of sixty-five. Art. 143, as proposed.
6. Members are appointed for full fifteen year terms. Art. 143(c) as proposed. Under the transitional provisions in sec. 2(b)(2) of the bill, the terms of office of present members of the Court will expire as under present law or after a minimum of 10 years, whichever is longer. Of the two new positions on the Court, one will be filled by a 12 year appointment. Thereafter, all appointments will be for 15 year terms.
7. Similar to present law, except the phrase "opportunity for hearing" is used in place of "hearing". Art. 143(f) as proposed.
8. Similar to present law. Art. 143(c) as proposed.
9. Similar to present law. Art. 143(d) as proposed.
6. Similar to H.R. 6298. Set forth in Art. 143(c) as proposed.
7. Similar to H.R. 6298, except that mental and physical disability are considered in the judicial retirement provisions of Art. 147(c). The removal provisions are set forth in Art. 143(d).
8. Similar to H.R. 6298. Art. 143(e)(1) as proposed.
9. Similar to H.R. 6298. Art. 143(e)(2) as proposed.

H.R. 6406

10. A retirement system based upon the retirement program for the Tax Court is set forth in Art. 147. Retirement is authorized under the following conditions: at age 70; at age 65 with 15 years of service; at completion of 15 year term when the judge has not been reappointed after signifying willingness to accept reappointment; and upon disability. Retirement compensation is based on the Tax Court's formula (i.e., full salary if 10 or more years service; a proportional fraction if less). The transitional provision in sec. 3(b)(5) authorizes present judges of the Court to retire at the completion of their present term or at age 65 with 10 years service. The Tax Court model was selected because that Court has in the judicial branch who hold life tenure. The Tax Court's plan represents an adaptation of the judicial branch's retirement system to a Court with limited tenure. Art. 147, as proposed, also authorizes the judges to participate in a survivors' annuity program similar to the program for the Tax Court. Judges who receive retired pay may be recalled to active service to fill temporary vacancies on the Court.

11. Similar to H.R. 6298 with respect to judges who hold senior judge status on the date of enactment. The senior judge provision is set forth in sec. 3(b)(4) of the bill. Future retirees will be subject to temporary recall under the retirement provisions of Art. 147.

12. Similar to H.R. 6298. The Court also must attempt initially to determine whether a retired judge will sit to seek the services of a senior judge. Art. 143(f) as proposed.

H.R. 6298

10. Same as present law.

Present Law

10. No provision for judicial retirement. Judges may qualify for civil service retirement if they meet age and minimum years of federal service criteria.

Subject

10. Retirement

11. Similar to present law, but specifies that basis for calling a senior judge to active service is to fill a temporary vacancy on the court due to an opening or disability or illness of a judge.

12. Similar, but the Court must first attempt to seek the services of a senior judge. Art. 143(b)(2) as proposed.

11. A former judge of the Court who receives civil service retired pay may become a senior judge, which entitles that person to an office and an assistant. The chief judge may call upon a senior judge to perform active service with the consent of the senior judge. Art. 67(a)(4).

12. If a judge is unable to sit because of temporary illness or disability, the President may appoint a judge from the D.C. Circuit to sit temporarily. Art. 67(a)(3).

11. Senior Judges

12. Temporary appointments from the D.C. Circuit

Present lawSubject

13. Seal

13. No express provision

14. Chief Judge.

14. The President designates one of the judges to be chief judge. Art. 67(a)(1).

15. Quorum.

15. The Court establishes its own rules with respect to a quorum. Art. 67(a)(1).

16. Office and sessions.

16. No express provision.

17. Precedence among judges.

17. The chief judge presides when present. The other judges preside according to the seniority of their commissions, and judges whose commissions bear the same date preside according to seniority in age. Art. 67(a)(1).

18. Rules of practice before the Court.

18. The rules are prescribed by the Court. Art. 67(a)(1).

H.R. 6298

13. Authorizes judicial notice

14. Same as H.R. 6298.

Art. 144(a).

14. Same as H.R. 6298.

16. Similar to present law. Art. 144(b).

15. Same as H.R. 6298.

15. A majority constitutes a quorum. Art. 144(c).

16. Similar to H.R. 6298, but the Court is authorized to sit where U.S. jurisdiction is exercised.

16. The Court's principal office is in D.C., but the chief judge may authorize the court to sit elsewhere if necessary for the expeditious disposition of cases. Art. 144(d)-(e).

17. Same as H.R. 6298.

17. Same as present law. Art. 144(f)

18. Same as H.R. 6298.

18. Similar to present law, but requires that the rules be the same so far as the Court deems practicable as the rules for appeal of criminal cases in the U.S. courts of appeals; but the rules may not be contrary to or inconsistent with the U.S. Art. 145(a).

Subject	Present Law	H.R. 6298	H.R. 6298
19. Time for filing petition for review and time for action on petition.	19. The accused has 30 days from the date of notification of a decision of a Court of Military Review in which to file a petition for review with the Court of Military Appeals. The Court has 30 days in which to decide whether the case should be reviewed. Art. 67(c).	19. The accused has 60 days from the earlier of (1) the date on which the accused is notified of the decision of a Court of Military Review, or (2) the date on which the decision is sent to the last known address of the accused by certified mail. The time in which the Court must act is not covered expressly, but is left to the Court's rulemaking powers. Art. 145(b) as proposed.	19. Same as H.R. 6298.
20. Scope of Review	20. Review is limited to the findings and sentence as approved by the convening authority and acted upon by a Court of Military Review. In a case certified by the Judge Advocate General, the Court has discretion to limit its review to the issues so certified; in cases heard upon petition of the accused, the Court may limit its review to the issues specified in the grant of review. The Court may act only on matters of law. If the Court sets aside the findings or sentence, it may order a rehearing except when the action is based upon lack of sufficient evidence; if it does not order a rehearing, the charges are dismissed. After the review, the Court may order that the case be returned for further proceedings in a Court of Military Review; otherwise, unless there is to be further review by the President or the Secretary with respect to the sentence, the case is returned to the convening authority. If a rehearing has been ordered by the Court, the charges may be dismissed. Art. 67(d)-(e).	20. Similar to present law. Art. 145(c).	20. Same as H.R. 6298.
21. Publication of Reports	21. No express provision; handled through executive action.	21. Authorizes publication of the Court's reports and use of the reports as evidence of the Court's decisions. Art. 146(a) as proposed	21. Same as H.R. 6298.
22. Employees	No express authority; handled through the Department of Defense.	22. Authorizes employment and compensation of employees under civil service rules; employees are to be in the excepted service. Art. 146(b) as proposed. The transition provision preserves the current civil service status of employees in the competitive and senior executive service. See 3(b)(1).	22. Same as H.R. 6298, except the transition provision states that the bill does not affect the rights of present employees of the Court.

Subject

Present Law

23. Authorization for expenditures

23. No express authority; the Court's budget is presented as part of DoD's budget.

24. Fees

24. No provision.

25. Annual Report

25. Requires an annual report from the Judges and the Judge Advocates General to the Armed Services Committees, the Secretaries of Defense and Transportation, and the military departments, concerning operation of the UCMJ. Art. 67(g).

26. Supreme Court review by writ of certiorari.

26. No express authority. In limited circumstances, the accused may obtain collateral review in a district court, with the possibility of final review in the Supreme Court. There is no authority for review at the request of the government.

23. Provides statutory authority for the Court's expenditures. Art. 146(c), as proposed.

24. Authorizes collection of a fee for copying and authenticating records; provides an exception to the fee for servicemembers whose cases are on appeal. Requires forwarding fees to the Treasury. Art. 146(d)-(e) as proposed.

25. Similar to present law. Art. 146(f) as proposed.

26. Authorizes the Supreme Court to review cases from the Court of Military Appeals through discretionary writs of certiorari in the following circumstances: (1) cases from the Court of Military Appeals involving the death penalty; (2) issues certified to the Court of Military Appeals and other issues upon which the Court took action in cases certified by the Judge Advocates General; (3) issues upon which the Court of Military Appeals granted review and other issues upon which the Court took action in cases reviewed upon petition from the accused; and (4) other cases in which the Court of Military Appeals granted relief. Direct review would not be authorized in cases in which the Court of Military Appeals had exercised its discretion to decline to review a case. The accused may be represented before the Supreme Court by military appellate counsel. The government may be represented by military appellate counsel under the direction of the Attorney General. The Supreme Court review provisions are set forth in section 4 of the bill.

26. Similar to H.R. 6298, but phrased in terms of "cases" reviewed by the Court rather than "issues" upon which the Court took action.

H.R. 6406

23. Similar to H.R. 6298.

24. Similar to H.R. 6298. Set forth in Art. 146(d) as proposed.

25. Similar to H.R. 6298. Set forth in Art. 146(e) as proposed.

Mr. WHITE. Mr. Gilliat, we're very glad to have you here today, and you may proceed.

STATEMENT OF ROBERT L. GILLIAT, ASSISTANT GENERAL COUNSEL (MANPOWER, HEALTH, AND PUBLIC AFFAIRS), DEPARTMENT OF DEFENSE

Mr. GILLIAT. I would be remiss, Mr. Chairman, if I didn't express the special appreciation of the Department of Defense for the high priority you have given to this legislative item. We recognize how busy the Committee on Armed Service is and your subcommittee during this session at this particular time, and we are appreciative of this honor by having our bill considered.

I'm sure you recognize that as the spokesman for the Department of Defense I am not by any means the expert in the area of military justice. They are arrayed in back of me here, and will soon be available to you.

I would also be remiss if I did not mention the diligent work of Andrew Effron of my office, who has done so much to help develop this proposal, working with the other departments of the Federal Government and with your own staff.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to present the views of the Department of Defense on H.R. 6298, the administration's legislative proposal concerning the Court of Military Appeals. This legislation is a matter of considerable importance to the Department of Defense because it directly affects both the ability of military commanders to maintain discipline and readiness, and the right of accused service members to receive fair trials.

The Court of Military Appeals is the highest court in the military justice system. The court was created by Congress in 1951 as part of the Uniform Code of Military Justice. The court is empowered to review cases arising under the Uniform Code of Military Justice, in which there is a sentence of death, a punitive discharge, confinement for 1 year or more, and in certain other cases. Under present law, the court consists of three members, appointed from civil life by the President with the advice and consent of the Senate. Each seat on the court carries a 15-year term. If a vacancy develops within a 15-year term, the successor appointed to that seat fills only the remaining balance of the term.

The rulings of the court have a profound impact throughout the military community. The stability of the court and the quality of its work are matters of major concern to the Department of Defense, our military commanders, and individual service members. This legislation is designed to provide the court with increased stature and the stability essential to the proper performance of its duties.

I would like to talk about the disruptive effect of excessive turnover, which you mentioned in your statement, Mr. Chairman.

In recent years the ability of the Court of Military Appeals to perform the duties assigned to it by Congress has been hampered by the disruptive effects of rapid turnover in membership. Since 1968, eight different judges have held the court's three seats. During one

4-year period, seven different judges sat in nine different combinations, including periods in which the court operated with only two members. Within the past 6 years, two members of this appellate court have departed to accept appointments to the Federal trial bench.

The unusual rate of turnover has had an adverse impact on the military justice system. A major consequence has been the creation of substantial instability and unpredictability in the military justice system. As the court's membership has suffered rapid turnover, the state of the law has become more uncertain. A prime example is found in the state of the law with respect to search and seizure. With a variety of judges sitting on the court, and with several decisions that have not commanded the concurrence of any two members, considerable confusion has arisen with respect to the extent of the power of military commanders to conduct administrative inspections of their troops. Because administrative inspections are an integral component of a commander's ability to insure readiness, this uncertainty can have a direct impact on the military mission. To a certain extent, change in doctrine is inherent in any judicial system as new issues arise and the fabric of the law changes with the times. The rapid change in personnel on the Court of Military Appeals, however, has accelerated and accentuated the adverse aspects of this process.

Because the rate of turnover has had a disruptive effect on the court's ability to formulate doctrine clearly, it has become unnecessarily difficult for military lawyers to advise their clients on the state of the law and for law instructors in the military departments to present military justice as a coherent discipline. For judge advocates representing the Government, undue instability in the law makes it difficult to provide advice to commanders on matters essential to the maintenance of discipline, such as the authority for searches or inspections. For judge advocates representing the accused, instability makes it difficult to advise service members on the alternative choices in trial strategy. Such instability has a further adverse effect in that it undermines respect for the law within the Armed Forces. To the extent that judge advocates are unable to advise their clients clearly, the impression is created that the military justice system is arbitrary and capricious. In a system where respect for the law is of paramount importance, it is imperative that such a development be avoided.

It is not our intention to criticize the capabilities of the judges of the Court of Military Appeals nor to base our request for legislation upon the outcome in any particular case. The Court of Military Appeals has done much to enhance the stature of the military justice system and to further the administration of justice in the Armed Forces. Our study of the court has convinced us that the problems facing the court, while serious, are well within the range of reasonable solutions, and I shall discuss our proposed approach to the problem of disruptive turnover at the conclusion of my statement.

A further difficulty with the current system is that the appellate process is not subject to direct review in the Supreme Court. Although it is well-established that constitutional guarantees extend to members of the Armed Forces, there is considerable room for interpretation as to the application of those guarantees under circumstances peculiar to military operations and national security. The Court of Military Appeals decides basic constitutional questions in large num-

bers of cases without the discipline and uniformity imposed by Supreme Court review. Under the present system, the Court of Military Appeals may interpret Supreme Court opinions in ways that either go substantially beyond or substantially restrict what the Supreme Court intended without any recourse for the Government and with only very limited recourse for the accused. At present, court-martial convictions are reviewed in the Federal courts only through collateral proceedings such as petitions for habeas corpus filed in Federal district courts. There is no statutory authority for decisions of the Court of Military Appeals adverse to the Government to be reviewed in the Federal courts.

For the accused, the absence of direct review by the Federal courts leads to "a judicial trek that has been criticized as inefficient, costly, time consuming, and redundant," and there I am quoting from "Justice and The Military" by H. Moyer. If, for example, the accused in a general court-martial receives a sentence that includes a punitive discharge, there is legal review by a judge advocate in the field, automatic appeal to a Court of Military Review, and the opportunity to petition for review by the Court of Military Appeals. The accused then is faced with a complex array of options for mounting collateral attack in which the opportunity for obtaining review, and the scope of review may differ considerably, depending on the court in which review is sought and the nature of the remedy sought. The doctrine of exhaustion of remedies may require the accused to pursue further actions in the military system prior to obtaining review in a Federal district court. Even if relief is obtained at the district court level, there is the likelihood of further review by a court of appeals. The situation is complicated by the procedural aspects of Federal court review. Moreover, the substantive treatment of the case may vary not only among the courts of appeal but also within particular circuits.

For the Government, on the other hand, there are no complex choices to be made. If there is a determination adverse to the Government in the Court of Military Appeals, there is no other tribunal to which the Government can appeal. This leaves the Government at a very substantial disadvantage in trying to shape a rational, consistent body of law. The law is developed entirely by the Court of Military Appeals without direct guidance from the Supreme Court. The absence of direct review in an article III court is of particular concern because of the nature of the issues decided adversely to the Government by the Court of Military Appeals. The court has ruled against the Government on cases considered by the military departments to be of direct importance to the maintenance of order and discipline in the Armed Forces, including issues involving search and seizure, interrogation and self-incrimination, subject matter jurisdiction, and the processing of cases. These key issues involve legal principles often considered by the Supreme Court with respect to civilian offenses. In cases where the Court of Military Appeals declines to follow Supreme Court precedent, the Government has no judicial recourse. In cases where the Court of Military Appeals follows civilian precedents despite unique military considerations, the Government also has no judicial recourse. In such circumstances, the Government must adhere to the decision without the benefit of Supreme Court review or seek legislation to obtain a different result. That is an unacceptable way to administer a justice system.

There is no other aspect of the Federal judicial system where a similar capstone court was set up to substitute for review in the Supreme Court. The decisions of all other Federal specialized courts may be reviewed by the Supreme Court. The decisions of military courts are not in a realm that is beyond the competence or natural focus of the Supreme Court. They are much like other specialized Federal courts in that they deal with a subject matter that is in some aspects technical, but in other respects requires consideration of broad constitutional or statutory issues. The benefits of the uniformity imposed by Supreme Court review are no less important to the military justice system than to the other specialized Federal courts.

OUR LEGISLATIVE PROPOSAL

The legislation addresses these problems by proposing the following measures:

A FIVE-MEMBER COURT

The present size of the court produces instability in doctrine. Because an important decision may be decided by a 2-to-1 majority, the departure or shift in position of only one judge can produce substantial changes in doctrine. Article 143(a), as proposed, would expand the size of the court to five members. The Court of Military Appeals is the highest court in the military justice system, and the creation of a five-member court is consistent with the American Bar Association standard that the highest court in a jurisdiction should be composed of at least five members.

FULL TERMS FOR ALL APPOINTEES

Under the court's current statutory authority, title 10, United States Code, section 867, if a member of the court leaves office prior to expiration of the 15-year term, the person appointed to fill the seat is granted tenure only for the balance of the term. This provision not only increases turnover, but also deters qualified persons from accepting judicial appointments with such limited tenure. Article 143(e), as proposed, would provide a full 15-year term to each person appointed to the court.

INDEPENDENT STATUS FOR THE COURT

Under present law, the court is located for administrative purposes in the Department of Defense. This arrangement occasionally has had an adverse impact on the perception of the court as a neutral tribunal. Because the Department of Defense is the primary litigant before the court, the stature of the court and the perception of its role as the highest tribunal in the military justice system would be enhanced by providing it with status as an independent court. Because the judges of the Court of Military Appeals serve limited terms, the court cannot be placed in the Federal judicial system along with the courts created under article III of the Constitution. The Tax Court, whose members also serve 15-year terms, provides a useful model for a court created by the legislative power under article I of the Constitution. Because the Court of Military Appeals is similar in status to the Tax Court, the legislation has been drafted to provide the Court of Military Appeals with a statutory basis similar to that of the Tax Court.

This concludes my discussion of the major features of the legislative proposal. The judge advocate general will provide further details as to the legislative proposal in their testimony. They are prepared to answer any questions you may have about the operation of the proposed amendments with respect to their services. I would be pleased to answer any questions you may have for me at this time.

WRITTEN STATEMENT OF ROBERT L. GILLIAT

The Court of Military Appeals is the highest court in the military justice system. The Court was created by Congress in 1951 as part of the Uniform Code of Military Justice. The Court is empowered to review cases arising under the Uniform Code of Military Justice in which there is a sentence of death, a punitive discharge, confinement for one year or more, and in certain other cases. Under present law, the Court consists of three members, appointed for a civil life by the President with the advice and consent of the Senate. Each member on the court carries a 15-year term. If a vacancy develops within a 15-year term, the successor appointed to that seat fills only the remaining balance of the term. The rulings of the Court have a profound impact throughout the military community. The stability of the Court and the quality of its work are matters of major concern to the Department of Defense, our military commanders, and individual servicemembers. This legislation is designed to provide the Court with increased stature and the stability essential to the proper performance of its duties.

THE DISRUPTIVE EFFECT OF EXCESSIVE TURNOVER

This unusual rate of turnover has had an adverse impact on the military justice system. A major consequence has been the creation of substantial instability and unpredictability in the military justice system. As the Court's membership has suffered rapid turnover, the state of the law has become more uncertain. A prime example is found in the state of the law with respect to search and seizure. With a variety of judges sitting on the Court, and with several decisions having not commanded the concurrence of any two members, considerable confusion has arisen with respect to the extent of the power of military command to conduct administrative inspections of their troops.¹ Because administrative

¹ E.g., *United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976); *United States v. Ro*
2 M.J. 31 (C.M.A. 1976).

inspections are an integral component a commander's ability to insure readiness, this uncertainty can have a direct impact on the military mission. To a certain extent, change in doctrine is inherent in any judicial system as new issues arise and the fabric of the law changes with the times. The rapid change in personnel on the Court of Military Appeals, however, has accelerated and accentuated the adverse aspects of this process.

Because the rate of turnover has had a disruptive effect on the Court's ability to formulate doctrine clearly, it has become unnecessarily difficult for military lawyers to advise their clients on the state of the law and for law instructors in the military departments to present military justice as a coherent discipline. For judge advocates representing the government, undue instability in the law makes it difficult to provide advice to commanders on matters essential to the maintenance of discipline, such as the authority for searches or inspections. For judge advocates representing the accused, instability makes it difficult to advise service-members on the alternative choices in trial strategy. Such instability has a further adverse effect in that it undermines respect for the law within the armed forces. To the extent that judge advocates are unable to advise their clients clearly, the impression is created that the military justice system is arbitrary and capricious. In a system where respect for the law is of paramount importance, it is imperative that such a development be avoided.

It is not our intention to criticize the capabilities of the judges of the Court of Military Appeals nor to base our request for legislation upon the outcome in any particular case. The Court of Military Appeals has done much to enhance the stature of the military justice system and to further the administration of justice in the armed forces. Our study of the Court has convinced us that the problems facing the Court, while serious, are well within the range of reasonable solutions, and I shall discuss our proposed approach to the problem of disruptive turnover at the conclusion of my statement.

ABSENCE OF SUPREME COURT REVIEW

A further difficulty with the current system is that the appellate process is not subject to direct review in the Supreme Court. Although it is well-established that constitutional guarantees extend to members of the armed forces, there is considerable room for interpretation as to the application of those guarantees under circumstances peculiar to military operations and national security. The Court of Military Appeals decides basic constitutional questions in large numbers of cases without the discipline and uniformity imposed by Supreme Court review. Under the present system, the Court of Military Appeals may interpret Supreme Court opinions in ways that either go substantially beyond or substantially restrict what the Supreme Court intended without any recourse for the government and with only very limited recourse for the accused. At present, court-martial convictions are reviewed in the federal courts only through collateral proceedings such as petitions for habeas corpus filed in federal district courts. There is no statutory authority for decisions of the Court of Military Appeals adverse to the government to be reviewed in the federal courts.

For the accused, the absence of direct review by the federal courts leads to "a judicial trek that has been criticized as inefficient, costly, time consuming, and redundant."² If, for example, the accused in a general court-martial receives a sentence that includes a punitive discharge, there is legal review by a judge advocate in the field, automatic appeal to a Court of Military Review, and the opportunity to petition for review by the Court of Military Appeals. The accused then is faced with a complex array of options for mounting collateral attack in which the opportunity for obtaining review, and the scope of review can differ considerably depending on the court in which review is sought and the nature of the remedy sought. The doctrine of exhaustion of remedies may require the accused to pursue further actions in the military system prior to obtaining review in a federal district court. Even if relief is obtained at the district court level, there is the likelihood of further review by a court of appeals. The situation is complicated by the procedural aspects of federal court review. Moreover, the substantive treatment of the case may vary not only among the courts of appeal but also within particular circuits.

For the government, on the other hand, there are no complex choices to be made. If there is a determination adverse to the government in the Court of

² H. Moyer, "Justice and the Military," 1182 (1972).

Military Appeals, there is no other tribunal to which the government can appeal. This leaves the government at a very substantial disadvantage in trying to shape a rational, consistent body of law. The law is developed entirely by the Court of Military Appeals without direct guidance from the Supreme Court. The absence of direct review in an Article III court is of particular concern because of the nature of the issues decided adversely to the government on the Court of Military Appeals. The Court has ruled against the government on cases considered by the military departments to be of direct importance to the maintenance of order and discipline in the armed forces, including issues involving search and seizure,² interrogation and self-incrimination,³ subject matter jurisdiction,⁴ and the processing of cases.⁵ These key issues involve legal principles often considered by the Supreme Court with respect to civilian offenses. In cases where the Court of Military Appeals declines to follow Supreme Court precedent, the government has no judicial recourse. In cases where the Court of Military Appeals follows civilian precedents despite unique military considerations, the government also has no judicial recourse. In such circumstances, the government must adhere to the decision without the benefit of Supreme Court review or seek legislation to obtain a different result. That is an unacceptable way to administer a justice system.

There is no other aspect of the federal justice system where a similar capstone court was set up to substitute for review in the Supreme Court. The decisions of all other federal specialized courts may be reviewed by the Supreme Court. The decisions of military courts are not in a realm that is beyond the competence or natural focus of the Supreme Court. They are much like other specialized federal courts in that they deal with a subject matter that is in some aspects technical but in other respects requires consideration of broad constitutional or statutory issues. The benefits of the uniformity imposed by the Supreme Court review are no less important to the military justice system than to the other specialized federal courts.

THE LEGISLATIVE PROPOSAL

The legislation addresses these problems by proposing the following measures:

1. *A Five Member Court.*—The present size of the Court produces instability in doctrine. Because an important decision may be decided by a 2-1 majority, the departure or shift in position of only one judge can produce substantial changes in doctrine. Article 143(a), as proposed, would expand the size of the Court to five members. The Court of Military Appeals is the highest court in the military justice system, and the creation of a five member court is consistent with the American Bar Association standard that the highest court in a jurisdiction should be composed of at least five members.⁶

2. *Full Terms for all Appointees.*—Under the Court's current statutory authority, 10 U.S.C. § 867, if a member of the Court leaves office prior to expiration of the fifteen year term, the person appointed to fill the seat is granted tenure only for the balance of the term. This provision not only increases turnover, but also deters qualified persons from accepting judicial appointments with such limited tenure. Article 143(e), as proposed, would provide a full fifteen year term to each person appointed to the Court.

3. *Independent Status for the Court.*—Under present law, the Court is located for administrative purposes in the Department of Defense. This arrangement occasionally has had an adverse impact on the perception of the Court as a neutral tribunal. Because the Department of Defense is the primary litigant before the Court, the stature of the Court and the perception of its role as the highest tribunal in the military justice system would be enhanced by providing it with status as an independent court. Because the judges of the Court of Military Appeals serve limited terms, the Court cannot be placed in the federal judicial system along with the courts created under Article III of the Constitution. The Tax Court, whose members also serve fifteen year terms, provides a useful model for a court created by the legislative power under Article I of the Constitution. Because the Court of Military Appeals is similar in status to the Tax Court, the legislation has been drafted to provide the Court of Military Appeals with a statutory basis similar to that of the Tax Court.

² See, e.g., note 1 *supra* and cases cited therein.

³ E.g., *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974).

⁴ E.g., *United States v. Williams*, 2 M.J. 26 (C.M.A. 1976).

⁵ E.g., *United States v. Henderson*, 1 M.J. 521 (C.M.A. 1976).

⁶ ABA Standards Relating to Court Organization, § 1.13 (1974).

4. *Review in the Supreme Court.*—The proposal provides the Supreme Court with discretionary authority to review decisions of the Court of Military Appeals. This will enable the government to appeal adverse decisions from the Court of Military Appeals, and will enable the accused to obtain direct review of cases in which the Court of Military Appeals granted review but entered a decision adverse to the accused. The legislation does not affect the traditional availability of the writ of habeas corpus as a means of reviewing convictions by courts-martial except insofar as the federal courts may view the filing with the Supreme Court of a petition for a writ of certiorari as a necessary remedy to be exhausted prior to seeking relief through habeas corpus.

This concludes my discussion of the major features of the legislation. The Judge Advocates General will provide further details as to the legislative proposal in their testimony. They are prepared to answer any questions you may have about the operation of the proposed amendments with respect to their services. I would be pleased to answer any questions you may have for me at this time.

Mr. WHITE. Thank you very much.

I think the most expeditious way for the subcommittee to proceed would be follow the suggestion of counsel that we have the Judge Advocate Generals testify at this time and you remain in place, and we will ask questions all at one time.

Mr. KAZEN. Mr. Chairman.

Mr. WHITE. Yes, sir.

Mr. KAZEN. May I ask to deviate from that procedure which you've just stated, since the House goes in at 11 this morning and I have to handle two of the bills that are on the schedule. I have some questions I would like to ask. I must leave a little early, and I may not be here by the time the other three gentlemen have finished.

Mr. WHITE. There's only one of the JAGs going to testify.

Mr. KAZEN. OK. I just wanted to ask some basic questions.

Mr. WHITE. Without objection, go ahead.

Why don't the Judge Advocate Generals come to the front, and then we will have your testimony following these few questions, and if one of you can respond to the questions of Mr. Kazen that would be very beneficial.

If you will proceed, Mr. Kazen.

Mr. KAZEN. Mr. Chairman, I would like to know about the workload of the court. Just what is the workload, how busy are they?

Mr. GILLIAT. We can, of course, provide figures on this, but I think, to state it generally, the workload is comparable to that of State courts. But let me give you some figures.

This is from the 1978 term. COMA—Court of Military Appeals—acted on 1,814 petitions for grants of review and granted review in 430 cases. COMA acted on 394 cases on its master docket. These were mandatory appeals, cases certified by the JAGs and cases heard upon grant of an accused's petition for review. These cases were decided by 67 signed opinions, 12 per curiam opinions, and 315 summary dispositions. COMA, in addition, acted on 98 cases on the miscellaneous docket, primarily petitions for extraordinary writs, and granted relief in 2 of these cases. At the close of that particular term 265 cases on the petition docket were pending disposition. In addition, 394 cases were pending on the master docket, and 10 cases were pending on the miscellaneous docket.

The comparisons are difficult, but it appears that the workload is as heavy as the Federal courts of appeals and heavier than most State courts of last resort.

Further statistical information can be provided for the record if you wish. [Not required.]

Mr. KAZEN. What I was thinking, Mr. Chairman, was that with the testimony that we've just heard about the court on many occasions having had only two members sitting, how do those two judges handle this type of a workload?

Mr. GILLIAT. The workload actually doesn't vary depending on the number of members of the court.

Mr. KAZEN. No. I understand that. But for two people to handle that type of workload puts a tremendous responsibility on two people.

Mr. GILLIAT. I fully agree.

Mr. KAZEN. And this is what I'm trying to get at.

What type of help do they have as far as briefing attorneys, as far as clerks, and so on, who have a direct bearing on the actual verdict of the court?

Mr. GILLIAT. Representatives of the court are here, judges of the court are here, and I suppose they could probably respond to that better than I. But there are at the present time 33 total employees, which would be 31 in addition to the two judges, and of those, several would be involved in actually helping with the decisions.

The way the court is constructed, it's divided into four sections. It has judicial offices, a clerk's office, office of the staff director, and office of the court executive. Each judge has two attorneys and two administrative and clerical persons on his staff.

The fiscal 1980 budget estimate provided for 46 employees plus the three judges, at an average grade of GS-9.93, and an average salary of \$25,444. But as of January they had only 33 employees, 18 of whom were attorneys, which may be the figure you're looking for.

Mr. KAZEN. Why do we have such a rapid turnover in this court?

Mr. GILLIAT. I think that's speculative, but I assume that it may have to do with the fact that there are some attractions of becoming a judge of the District Court of the United States, such as life tenure, the uncertainty and briefness of tenure that they may have if they're in the Court of Military Appeals, if they're filling out a limited term for less than the full 15 years.

Mr. KAZEN. I understand that. But if there are only three judges and they have 15-year terms that in itself does not account for the tremendous turnover which you've told us about. In other words, one of two things is happening. Either the man who has been appointed has not been interested or did not have a continuing interest to stay on the court, and should not have been appointed in the first place, or, second, there have been a lot of deaths, or illnesses, and so on. I cannot imagine that out of these three judges practically every one of them has been appointed to a Federal bench.

Mr. GILLIAT. No. But recently two left the court for the Federal bench.

Mr. KAZEN. I know. But we're talking in your terms.

Mr. GILLIAT. There have been retirements as well.

Mr. KAZEN. Retirements before the 15-year period is up?

Mr. GILLIAT. No, I don't think so.

Mr. HOGAN. Would the gentleman yield?

Mr. KAZEN. Yes, surely.

Mr. HOGAN. Maybe I can help a little bit with that, Mr. Kazen.

There have been resignations. There have been retirements. There have been at least two deaths. There have been those kinds of things that happen.

These gentlemen are not in a very good position to testify on what I am about to say now. But the retirement system is not good, and many of them do not fully realize that until they get there. It doesn't compare with retirements in other courts, and the provision that Mr. White has added to the legislation would remedy that situation, and I think that will have a significant effect in attracting the type of person you mentioned.

Mr. KAZEN. I understand, counsel, and I agree that there should be change, and we should do everything we can to make this position an attractive position to attract the best possible minds that we can because we are dealing with a very important segment of our society.

However, I don't believe that anybody who is eligible to sit—and by eligible I mean qualified to sit—would not know ahead of time what his retirement was going to be, and should not have accepted this type of an appointment if he did not intend to serve the full term.

Now, we are not going to take care of that situation, regardless of how much legislation we pass. It's going to depend on the individual who is appointed, and, knowing that they have a 15-year term—of course, situations change—that's a long time. My gosh, if I were appointed to the court and within 2 years there was an opportunity to go on the Federal bench I'd take it, if I was going to stay on the bench the rest of my life.

But the reason I'm asking these questions is so that I can understand in my own mind the reason for some of these provisions and the shortcomings that we are talking about now and how they will be improved by legislation. It may be that we might need some additional proposals in the legislation to get at some of these questions that I have in mind.

Mr. Chairman, I'm not going to take up any more time. I just wanted to have a basic understanding of the court.

One more question.

Will you outline for me the reviews, beginning with the court-martial right up through the Court of Military Appeals? Just how many steps are there that we're talking about to get to the Court of Military Appeals? Tell me about the system of military justice as far as the courts are concerned.

Mr. GILLIAT. I can make an attempt, although I hesitate when I have these experts with me.

Mr. KAZEN. What's the lowest?

Mr. GILLIAT. Could I have one of the JAGs do that for you? I'm sure that you will get far more accurate information.

Mr. KAZEN. Yes, sir, I'd be delighted. I just wanted to know what the system is. Here you have the Court of Military Appeals as the last resort in these cases.

Mr. GILLIAT. General Harvey, would you like to take that one?

General HARVEY. Yes: I'd be glad to.

Immediately after trial, sir—there is, of course, a verbatim record maintained of a court-martial—the Staff Judge Advocate, the senior legal officer of the command concerned, who is usually an officer in the grade of lieutenant colonel or colonel, with 15 to 20 years' military justice experience, conducts a total review of the trial to insure that

it is free of legal errors, that there was nothing harmful to the rights of the accused, and that it was conducted properly.

This review is then presented to the convening authority with the staff judge advocate's recommendation. Assuming the convening authority approves the trial, the record is then forwarded, and assuming we have a sentence of a certain magnitude, it will then go to the Court of Military Review of the applicable service.

Mr. KAZEN. Who sits on that review?

General HARVEY. The Courts of Military Review are, again, composed of senior judge advocate officers, very experienced, in the grades of lieutenant colonel and colonel, usually colonel, most of them with in excess of 20 years' judge advocate military justice experience.

Mr. KAZEN. And they are all officers?

General HARVEY. That is correct, sir.

The counsel for the accused is a member of one of the appellate divisions, a defense appellate attorney, who specializes in representing the accused on appeal. He will then brief the case, raise his issues, much as would be done in any civilian appellate court, and the Government side will brief the reply. The case will go to the Court of Military Review, and it will determine whether the issues presented by counsel were proper or done improperly.

Then, if the court reaches a decision that is adverse to the accused, the accused may petition the Court of Military Appeals, and if that court then grants the petition they will examine, again on briefs of counsel, the particular issues upon which they granted review.

By the time the case gets to the Court of Military Appeals it has been totally legally reviewed by trained attorneys at two levels: The staff judge advocate at the court-martial convening authority level, and at the Court of Military Review, which is a court in the truest sense of the word.

Mr. WHITE. The time of the gentleman has expired.

Mr. KAZEN. Thank you, Mr. Chairman.

Mr. WHITE. Mr. Montgomery.

Mr. MONTGOMERY. Thank you, Mr. Chairman.

Mr. Chairman, since we have a quorum here I make a motion that we authorize the chairman, at his discretion, today and at a subsequent meeting, to resolve the meeting into executive session for the purpose of receiving information relating to national security.

Mr. WHITE. A rollcall is automatic. The clerk will call the roll.

[Rollcall vote taken.]

Mr. WHITE. The vote being unanimous, it is so ordered that the Chair at his discretion will announce the time of a closed hearing.

I understand, Admiral McDowell, you are to be the spokesman today and leadoff for the Judge Advocate Generals.

Admiral McDOWELL. Thank you, Mr. Chairman.

Mr. WHITE. If you will proceed, sir.

STATEMENT OF REAR ADM. C. E. McDOWELL, JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral McDOWELL. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before the subcommittee today to discuss the proposed legislation to modify the structure of the U.S.

Court of Military Appeals. I will make a brief oral statement not only on behalf of the Department of the Navy, but also on behalf of the other Judge Advocate Generals, who are here with me at the witness table this morning and who will provide their own written statements for the record.

In making this statement, Mr. Chairman, I will try to speed up and not cover the same things that Mr. Gilliat has already covered.

I would like to begin my remarks in support of this proposed legislation by highlighting the structural problems of the present U.S. Court of Military Appeals and then indicate how the proposed modifications to the structure of the court should resolve these problems.

As you are aware, the current U.S. Court of Military Appeals was created in 1951. The concept of a panel of civilian judges to hear appeals from military courts-martial was then, and remains today, basically sound. It is how this concept was legislatively structured that has been the problem. Congress determined that a three-judge panel, with each judge appointed for a term of 15 years, was sufficient. As Mr. Gilliat covered in his testimony, if a judge left the court prior to the completion of the 15-year term, the new judge would only be appointed for the remainder of the departing judge's unexpired term. Additionally, Congress determined that the review of military courts-martial would be complete after review by the U.S. Court of Military Appeals. Thus, no provision for review by the U.S. Supreme Court via certiorari was provided. These three areas, that is, size of the court, terms of the judges, and lack of certiorari to the U.S. Supreme Court, now warrant reconsideration.

We believe that legislation in each of those three areas is now necessary to correct the unsettled, confusing, and disrupting state of military justice caused by the current structural deficiencies in the U.S. Court of Military Appeals, deficiencies which have become increasingly evident during recent years. These defects have resulted in a significant negative impact on the military justice system and on good order and discipline in the Armed Forces.

The first two areas, that is, size of the court, and terms of the judges, are interrelated. What has happened is that the U.S. Court of Military Appeals has become like a revolving door, with the most recent departure, just last October, being Judge Perry, after serving only 3 years, when he was appointed to a U.S. District Court judgeship in South Carolina.

The result of this high rate of turnover has been a lack of predictability and abrupt swings in doctrine by the court. Accordingly, military courts, and more importantly, military commanders, cannot rely on well understood precedent when they perform their legal and quasi-legal responsibilities under the Uniform Code of Military Justice. Of special significance, as also mentioned by Mr. Gilliat, are the commanders' responsibilities in the areas of pretrial and post-trial restraint, the conduct of searches, and the identification of precisely what offenses are violative of the Uniform Code of Military Justice. Consequently, a very visible degree of uncertainty and frustration now prevail, from the accused to the highest levels of command. Of equal importance is the impact of such uncertainty and frustration on the overall responsibilities of commanders to field and maintain an effective and operational fighting force. Where legal precedent is unclear

or constantly shifting, commanders are unable to move with confidence and certainty to maintain that degree of good order and discipline essential to the viability of our Armed Forces.

The proposed legislation will enlarge the court from three to five judges, and provide for an improved term structure. This should help stop the "revolving door" problem, and also help prevent the abrupt swings in doctrine inherent when one member of a three-judge court leaves the court.

Compounding this problem has been the activist nature of the court since 1975. While some of the changes imposed by the court through their decisions have improved the military justice system, many have resulted in severe problems for military commanders and some even threaten operational readiness. Although we have been able to soften the impact of some of these decisions in later cases and have sought legislation to overrule others, without the possibility of review by the Supreme Court, the U.S. Court of Military Appeals has carved out legal doctrines not found in the mainstream of Federal jurisprudence. This should not be permitted to continue without further review of the court's decisions. As with every other Federal appellate court, the Supreme Court should be able to review significant legal questions that arise in the military justice system. This is even more important, now that the Federal Rules of Evidence have been basically incorporated in the proposed Military Rules of Evidence, which we hope will become effective in the very near future. While I recognize that the Supreme Court's docket is crowded, significant legal doctrines and decisions which may effect the ability of the Armed Forces of the United States to carry out its responsibilities, deserve the potential for review by the highest court of our land.

The provision in the proposed legislation for certiorari to the Supreme Court, combined with the increased stability and predictability of a five-judge court, should insure that the U.S. Court of Military Appeals remains in the mainstream of Federal jurisprudence, and that its legal decisions and doctrines evolve along the same lines as those evolving in our Federal appellate courts.

In summary, I believe that this legislation is essential for the proper functioning of the military justice system and the maintenance of good order and discipline in the Armed Forces. On behalf of all of the services, I urge its enactment.

I appreciate this opportunity to testify on this important legislation, and we will be happy to answer any questions the subcommittee may have.

Mr. WHITE. Thank you very much, Admiral.

[The statements of Maj. Gen. Alton H. Harvey, Maj. Gen. Walter D. Reed, and Rear Adm. Clifford F. DeWolf follow:]

WRITTEN STATEMENT OF MAJ. GEN. ALTON H. HARVEY, JUDGE ADVOCATE GENERAL OF THE ARMY

INTRODUCTION

Mr. Chairman and members of the committee, I am Maj. General Alton H. Harvey, the Judge Advocate General, Department of the Army. It is my privilege to provide the views of the Army on the legislative proposal to reform the United States Court of Military Appeals.

The Army supports the proposed legislation to strengthen the military justice appellate process by reforming the Court of Military Appeals. Among its key features are provisions to—

Increase the size of the Court to five members,
 Appoint the judges to full 15-year terms, and
 Allow the discretionary review of decisions of the Court of Military Appeals by the Supreme Court through writs of certiorari.

The Army supports the concept of a single appellate court, exclusively hearing appeals from courts-martial, as the highest court in the military justice structure. The United States Court of Military Appeals is necessary because it provides: First, the special competence in complex and important military matters that comes from a narrowly focused inquiry; second, the speedy resolution of cases because of a docket unencumbered by other matters; third, the certainty and predictability that comes from uniformity of decisions affecting all of the Armed Forces; and fourth, the independence and perspective of civilian review of the military justice system. While the Court of Military Appeals has served well the specialized needs of the military community for almost three decades, its operations have gradually revealed several fundamental organizational flaws which have lead to uncertainty and frustration in the administration of military justice. The need for this proposed legislation arises out of these identified flaws.

SIZE OF THE COURT AND JUDICIAL INSTABILITY

The present size of the Court of Military Appeals has tended, particularly in recent years, to produce instability in the established body of military law. Primarily, this has come about by the rapid turnover in membership which resulted in new majorities being formed. While this problem can arise in any court, it has tended to be quite frequent at the Court of Military Appeals where the departure of a single judge of a two member majority can bring about an abrupt shift in existing law.

During the past 10 years, eight different judges have sat on the Court. Within a 4-year period, seven different judges sat at various times in nine different combinations. Two of the vacancies during the past decade occurred as a result of illness or death, and two judges departed the Court within the past 6 years to accept appointments as Federal district judges. The most recent departure was that of Judge Matthew J. Perry, who was appointed last October to the United States District Court in South Carolina.

The frequent turnover of personnel on a three-member court with the concomitant uncertainty in the substantive law exemplify why the Court, with the present number of judges, is too fragile to provide the consistency of decisions essential to the proper functioning of any judicial system, let alone the military justice system. Two problems are presented by this turnover: First, the reversal of precedents through a change of Court membership; and second, the inability to function effectively during the period when replacement judges are being selected.

Increasing the membership of the Court from three to five will promote desirable stability in its decisions by reducing the likelihood that the departure of a single judge will adversely impact upon the stability of the Court and the certainty of its precedents.

FULL TERM

As presently constituted, if a member of the Court of Military Appeals leaves office prior to expiration of the fifteen-year term, the judge appointed to fill the vacant seat is granted tenure only for the balance of the term. This present provision not only aggravates the prospects of turnover, but also makes qualified persons hesitant to accept a judicial appointment with such limited tenure and the uncertainty of future appointment. For example, the term of the present vacant seat—that of Judge Perry—expires 1 May 1961. I believe that by providing a full 15-year term for all appointees should reduce undesirable turnover in the Court's membership, while increasing the desirability of service.

TIME FOR APPEALS

Under present law, an accused is required to file his petition for review in the Court of Military Appeals within 30 days of being notified of the service Court of Military Review decision. The Court has interpreted this provision to require that the accused must receive actual notice before the start of the 30-day appeal period.

Prior to completion of appellate review, an accused, not in confinement, is often granted excess leave—which is leave from active duty without pay. During this leave period, an accused sometimes may move without providing his current address to military authorities, and it becomes extremely difficult to serve a

decision on him in a timely manner. The result is the inability of the Government to close out its cases.

The proposed legislation will remedy this problem by extending to 60 days the time during which the accused may petition the Court of Military Appeals for review, and by allowing the time to begin running from the earlier of: (1) the date on which the accused is notified of the lower court decision; or (2) the date on which the decision is mailed to the accused at the address listed in his service record.

The Army supports the proposed changes. It will encourage finality of appeals by closing out cases in a fair and timely manner.

REVIEW OF THE SUPREME COURT

A fundamental flaw of the current military justice system is the lack of direct review by the United States Supreme Court. Congress has never given the Supreme Court direct appellate jurisdiction over military criminal cases. I think the Supreme Court should be able to directly review significant legal questions that arise in the military justice system.

The Court of Military Appeals, in the legal review of military cases, decides many significant constitutional issues. One such issue is the proper application of *O'Callahan v. Parker*, 395 U.S. 258 (1969) to military jurisdiction. The Court of Military Appeals has issued numerous opinions on the *O'Callahan* issue. Many of these cases are contrary to decisions in the Federal District Courts. We believe the Court of Military Appeals has deviated, in some cases, from the rule established by the Supreme Court in *O'Callahan*. But as there is no statutory means for further appeal, by the government, of cases from the Court of Military Appeals, we are bound by their decisions. On the other hand, the accused can seek further review of these decisions by collateral attack in the Federal Courts.

The Army supports the proposal to extend the appellate jurisdiction of the Supreme Court to review decisions of the Court of Military Appeals by writ of certiorari. This provision for review will be available to both the Government and the accused. I believe that the present system where the Court of Military Appeals decides basic constitutional questions without the possibility of further review adversely affects the operation of the entire military justice system. While I anticipate that the Supreme Court will grant review in only a small number of cases, the mere prospect of review should assist in securing uniformity with other Federal Courts in interpretation of constitutional issues.

In summary, I believe the legislation is essential to the stability of the military justice system, and the predictability which subordinate military courts, legal officers, and commanders have a right to expect as they perform their responsibilities under the Uniform Code of Military Justice. On behalf of the Department of the Army, I urge its enactment.

WRITTEN STATEMENT OF MAJ. GEN. WALTER D. REED, JUDGE ADVOCATE GENERAL OF THE AIR FORCE

Mr. Chairman, members of the committee, I am Major General Walter D. Reed, The Judge Advocate General of the Air Force. I appreciate the opportunity to appear before you and present the views of the Department of the Air Force on this legislation.

The Air Force recommends the enactment of this necessary legislation for it will enhance the stature of the United States Court of Military Appeals and promote stability in military law. We believe it will improve the military justice system, as it is seen and in fact, by strengthening the appellate process as well as the Court itself.

We have always supported the institution of the Court of Military Appeals. Although we have disagreed with some decisions of the Court, especially those which have severely restricted military jurisdiction over off-base drug offenses, we believe the Court, in the main, has served the system well.

As military justice has evolved, however, it has become clear that some elements in the basic structure of the Court have contributed to the creation of uncertainty in military law. It is this uncertainty that is the primary factor in our desire for this legislation.

We believe there is a special need for clarity in military law. Our personnel are subject to the high standards of discipline and honor that are found in

military law, and they deserve the clearest delineation of both their legal obligations and their legal rights. At the same time, commanders have significant responsibilities in the administration of criminal justice. Discipline and justice equally are command concerns, and our law must be definite and capable of being applied by commanders.

One major area of law—the Court's decision on search and seizure in the barracks setting—illustrates the problems created by uncertainty. Commanders and judge advocates are uncertain under what circumstances evidence discovered during an inspection of the barracks will be admissible in a trial by court martial.

For years, this area of the law was reasonably well defined, by personnel turbulence on the Court has brought a continuing flow of new judges. They have had differing philosophies on the Fourth Amendment, and as a consequence, they have reached differing interpretations of constitutional law as it is applied to a commander's inspection of a barracks for contraband, unit readiness, and health and safety matters. There is a pressing need for longer service from the judges on the Court, and an equal need for a better opportunity for the members to reach a consensus in their decisions. Thus, the proposal to increase the size of the Court from three to five members, along with the changes in tenure, is the key position in this legislation.

With only three judges on the Court, the change of a single judge can completely alter the direction of military law. The addition of two judges would make the Court less subject to rapid changes of course when there are changes in Court personnel. Also, although all appellate courts, regardless of the number of judges, occasionally are unable to reach a majority opinion, in five judge court would give the Court of Military Appeals a broader base from which a consensus could be reached and continuity in the law established.

The granting of a 15 year term from the date of each judge's appointment will further enhance the stability of the court and make appointment more attractive to highly qualified attorneys. Together, these two provisions should accomplish the major goal of this legislation—stability of the court and law.

This legislation also provides for a limited right of Supreme Court review, a right which now does not exist. For example, the decisions relating to jurisdiction over drug offenses, which were based on the Court's interpretation of constitutional requirements, have left the government without recourse to the Supreme Court, the institution which is the final arbiter of federal constitutional questions for all other jurisdictions. The proposed legislation will, in large measure, alleviate this difficulty by permitting discretionary review of the Court's decisions by the Supreme Court.

Equally significant is the provision permitting the accused to seek review by the Supreme Court review of an adverse decision except after challenging the conviction in the federal courts in a collateral attack.

Concerning the independent status of the Court, the perception of independence as well as independence in fact is essential to the proper administration of the military justice system. Thus, we fully support the provisions to establish the Court as an independent court under Article I of the Constitution.

In sum, we believe the proposed legislation will substantially benefit the administration of military justice from the point of view of both the government and the accused. I consider this legislation vital to furthering the real needs of military discipline and urge its early enactment.

Thank you for this opportunity to testify. I will be pleased to answer any questions you have.

WRITTEN STATEMENT OF REAR ADM. CLIFFORD F. DEWOLF, CHIEF COUNSEL
OF THE COAST GUARD

Mr. Chairman and Members of the Committee:

I am Rear Admiral Clifford F. DeWolf, Chief Counsel of the U.S. Coast Guard. Thank you for the opportunity to express the views of the U.S. Coast Guard, Department of Transportation on H.R. 6298, a bill designed to improve the appellate process in the military justice system.

The major thrust of the bill, as I view it, is to create more opportunity for certainty in the law. It is fundamental that an adequate degree of certainty or predictability is an important ingredient in any system of justice if it is to serve society well. That is not to say that the law must stand still. It cannot

and still meet the needs of an everchanging military society. But evolutionary rather than drastic change is usually more desirable, and oscillatory change is almost always destructive.

Two major provisions of Section 3 of the bill, one which increases the members on the Court of Military Appeals from 3 to 5, and the other which permits a newly appointed judge to sit for a full 15 year term, serve to create greater opportunity for certainty in the law and to assure that changes which do occur will be evolutionary. Obviously, it would be naive to expect that an increase in the size of any court will guarantee that the law will become more stable, and hence less disruptive to the society it serves. It would be just as naive to expect a new court to speak with a unanimous voice. Not since the days of John Marshall has a high court been able to accomplish that consistently. Though I do not view this bill as a vehicle which will guarantee that the military appellate process will be perfectly accomplished, I do believe that shifts in the doctrine of the Court should be significantly decreased.

Other provisions in the bill also create the opportunity for improvement in the courts-martial appellate process. Though the provision for opportunity of review by the Supreme Court may not result in frequent case considerations by that august body, enactment of the provision will certainly contribute to public perceptions of fairness, justice and more appropriate supervision of the military justice system. Finally, although some minor delay has been added to the appellate process by the provision which increases, from 30 to 60 days, the amount of time granted to an accused to petition the Court of Military Appeals, that same provision adds needed certainty as to when that time begins.

For the foregoing reasons, we believe the bill will indeed improve the military appellate process. We, therefore, join the Department of Defense and other military services in urging its enactment.

Mr. WHITE. I'll call on Mr. Montgomery at this time.

Mr. MONTGOMERY. Thank you, Mr. Chairman.

Before making a comment to our witnesses I would like to inform our group here today it looks like Chairman White has been reelected down in Texas, without opposition.

Mr. WHITE. I wouldn't say that. Let's wait until November.

Mr. MONTGOMERY. I certainly hope no Independents show up, which I'm sure they won't.

Mrs. HOLT. They have very good taste in Texas.

Mr. WHITE. That's a part of their work files.

Mr. MONTGOMERY. No. They think you're appointed. [Laughter.]

Mr. Chairman, I don't have any questions, other than to say I see a former counsel of this subcommittee, Judge Bill Cook, is in the audience, and will testify before us this morning. We enjoyed working with him over the years when he was counsel to this subcommittee.

The only thing that I would comment on is do the Judge Advocate Generals of the different services support this legislation? I assume you all support it.

Admiral McDOWELL. Yes, sir.

General HARVEY. Yes, sir.

General REED. Yes, sir.

Admiral DEWOLF. Yes, sir.

Mr. MONTGOMERY. I won't bring up the other question, how much more does it cost. I hope we can get that for the record.

Thank you, Mr. Chairman.

Mr. WHITE. Thank you, Mr. Montgomery.

Mrs. Holt?

Mrs. HOLT. Thank you, Mr. Chairman.

I have some problems with this Supreme Court part of it.

Has any analysis been done of how much this will increase their docket? You've commented, and I know, that they do have a crowded

ocket. What's that going to do to them? Are we then going to have to think about enlarging the Supreme Court?

Admiral McDowell. Of course we have no way of knowing how many cases in which they will grant certiorari. We do not think that it will be that many that it will snow the Supreme Court under.

Mrs. HOLT. But you haven't analyzed the potential?

Mr. GILLIAT. We did; it is apparently based upon estimates.

At present, the Supreme Court receives between 3,500 and 4,000 petitions for certiorari each year. We would anticipate that under our legislation only another 200 to 300 would come from the military justice system.

Now, this is based upon our legislation's limit to cases in which the Court of Military Appeals granted the petition for review, or petition for relief. COMA would hear about 400 such cases a year that would be subject to the potential for petition for certiorari. In cases where COMA takes action resulting in affirmation of a petition we would expect the accused to file a petition for a writ of certiorari in most cases. With respect to cases decided against the Government, it is likely that petitions would be filed only in those cases having a substantial effect on the military justice system.

So the answer is, our estimate, 200 to 300.

Mrs. HOLT. And that's based on that type of case that you've seen in the past and numbers?

Mr. GILLIAT. Yes; so that's less than a 10-percent increase.

Mrs. HOLT. Thank you.

I have no further questions, Mr. Chairman.

Mr. WHITE. Thank you, Mrs. Holt.

Mr. Won Pat?

Mr. WON PAT. Thank you, Mr. Chairman.

Generals, Admiral McDowell, Admiral DeWolf, it's a pleasure to have you here and welcome you to this subcommittee.

Regarding the situation that there is a heavy workload now facing the three judges. How long does it take, in other words, how long does an appellant have to wait until his case is heard and decided by the court?

Admiral McDowell. I don't have my figures. Bob, do you have some figures?

Mr. GILLIAT. How long does it take a case to go through—

Mr. WON PAT. Yes.

General HARVEY. Do you want me to pick that up?

Mr. GILLIAT. Sure.

General HARVEY. Sir, I do not have specific figures in front of me. However, it would run on the average of a year, some cases somewhat more, some cases somewhat less. Much of this depends upon how soon the judges are able to agree upon the result.

Mr. WON PAT. How much of this waiting time could be reduced if you had five judges?

Mr. GILLIAT. I don't see that there would be necessarily any reduction because they will not sit in separate panels. They'll still all sit together, and there will be an exchange presumably of proposed opinions among them, and this won't result in any reduction as far as I can see in the time it would take.

Mr. WON PAT. Can you tell us what was the rationale for not giving the Supreme Court the authority to hear appeals from the Military Court of Appeals?

Mr. GILLIAT. What was the original rationale?

Mr. WON PAT. Yes.

Admiral McDOWELL. I can't remember. It's been a long time since I've read the legislative history of that 1950 act, that went into effect in 1951. It was a new scheme, and I think they probably originally felt that with three judges appointed from civilian life it would be a very specialized practice and that certiorari to the Supreme Court was not necessary.

Mr. HOGAN. Would the gentleman yield on that, Mr. Won Pat?

Mr. WON PAT. Yes.

Mr. HOGAN. Just to add to what Admiral McDowell said, during the course of the testimony back in 1949 on the Uniform Code of Military Justice, Congress envisioned the Court of Military Appeals as being the Supreme Court of the military. They didn't envision going beyond their own system, and that was pretty much the way they felt about it, Mr. Won Pat, in Congress at that time.

Mr. WON PAT. But then a change in the circumstances warranted it, didn't it?

Admiral McDOWELL. Yes, sir.

Mr. WON PAT. What is the position of the American Bar Association (ABA) with respect to this proposal? Do you have any idea?

Admiral McDOWELL. I assume you may have received a communication from the ABA. I don't have the wording of the exact resolution that was passed by the house of delegates last year, but I know that, in general, the ABA has supported this legislation and that they agree it will, if adopted, constitute a significant milestone in the evolution of the Court of Military Appeals. I know also you recognize our situation as to the retirement provisions. I know, however, that the ABA is on record supporting the retirement provisions of Chairman White's bill.

Mr. WON PAT. Thank you, Admiral.

Thank you, Mr. Chairman.

Mr. WHITE. Thank you, Mr. Won Pat.

Mr. Hillis.

Mr. HILLIS. I don't have any questions, Mr. Chairman.

Mr. WHITE. Thank you, Mr. Hillis. Gentlemen, let me ask some questions pertaining to a comparison of the two bills.

First, going further on the question of reference to the Supreme Court, the bill that was proposed by the administration speaks in terms of issues being submitted. The bill as introduced in the House, I understand, pertains to cases.

Is there any precedent at all in which the Supreme Court decides issues but not a case, or a fact case, of the Court, in other words, in abstractions?

Mr. GILLIAT. It's my understanding that there is considerable doubt about that, that there were some cases that had at some time been interpreted as permitting that, but that there was sufficient doubt about its validity in those decisions currently, that in view of some it would be a needless risk to do it on the basis of issues rather than cases.

Mr. WHITE. I'm not so sure the Supreme Court would welcome that, what in the abstraction to say OK on this issue because facts often qualify the issue.

Mr. GILLIAT. That's right.

Mr. WHITE. And facts can be unhinged from the case.

I was looking to determine who could seek the writ of certiorari. Can both sides seek that?

Mr. GILLIAT. Yes, sir.

Mr. WHITE. Would it be unduly loading down the Supreme Court with an additional number of cases to review?

Mr. GILLIAT. I wouldn't think so. As I tried to respond to Mrs. Holt, it doesn't seem to me to be a terribly significant number of additional petitions that we would anticipate and I would assume that they could handle this, as they do so well with many other things.

Mr. WHITE. Going back to the question of the retirement system, I presume that the retirement system that's contemplated does not envision contribution by the judges, or does it?

Mr. GILLIAT. The retirement proposal of the administration's bill, of course, would simply continue the present system, where there is a contribution; and the proposal that is based upon the Tax Court's retirement system also anticipates a contribution from the judges if they remain in the civil service program, but not if they elect to participate in the Court's retirement program.

Mr. WHITE. Did I read somewhere in one of these bills whereby in the transition period if a person is not reappointed, though willing, after the expiration of the term that person could then be eligible for retirement, or is there a 15-year requirement?

Mr. GILLIAT. I believe he has to be in for the full 15 years. He has to serve the full 15-year term.

Mr. WHITE. The full 15-year term.

Mr. GILLIAT. I'm sorry, Mr. Chairman. They only have to serve 10 years during the transition period, but following the transition period it would be the full 15 years.

Mr. WHITE. If they retire after 10 years of service during the transition period then they draw the full retirement, or do they just draw a portion, depending upon how much contribution they've made?

Mr. GILLIAT. I believe it's the full retirement for that limited period.

Mr. WHITE. They get a little bit of a windfall there.

Mr. GILLIAT. Yes.

Mr. WHITE. Is there another precedent for that?

Mr. GILLIAT. I believe this was modeled after the transition for the Tax Court, but there is this difference: If under the transitional provisions, the term of a judge is for a term of less than 15 years, and the judge is not reappointed, full retirement is authorized at the end of the term if the judge has completed at least 10 years of service.

Mr. WHITE. One other question I have here.

The bill of the administration said that in sitting in jurisdictions the Chief Judge may authorize the court to sit elsewhere, if necessary, for the expeditious disposition of cases. The House bill says that the court is authorized to sit where the Uniform Code of Military Justice jurisdiction is exercised.

First, I would like an explanation of the difference, and under the administration's bill does that mean that the court could go to a mili-

tary base in Thailand if we had one there now, or to Iceland, or any place in the world to exercise its jurisdiction, or is there a limitation to it?

Admiral McDowell. No, I don't really see any difference in the two provisions. Currently the UCMJ (Uniform Code of Military Justice) can be enforced around the world, and I see no difference in those two provisions.

Mr. WHITE. The jurisdiction of the Military Court of Appeals is not for the normal hearings, but is for appellate presentation, correct?

Admiral McDowell. Yes.

Mr. WHITE. That means no new facts, no witnesses, just merely an argument on the briefs and the facts already established by the reviewing court or the trial court. Is that right?

Admiral McDowell. Yes.

Mr. WHITE. What need is there to go abroad or some other place for hearings?

Admiral McDowell. With the original act, really for logistics purposes, I would say. For example, we in the services may establish branch courts of military review, if we see that logistically, cases could move quicker. In the Navy we used to have a branch office of the old board of review on the west coast. This is really, I would say, a contingency provision.

Mr. WHITE. With a five-member court why would it be more convenient for five judges to go to Alaska than for the Supreme Court to go to Hawaii for a hearing?

General HARVEY. May I address that question, Mr. Chairman?

Mr. WHITE. Yes, sir.

General HARVEY. I know of no circumstances in which the Court of Military Appeals has ever sat anywhere other than in the District of Columbia. I cannot visualize such a set of circumstances, barring some extraordinary event.

I think that this is not unusual authority, however, for a superior court of a system to be able to sit anywhere within the court's jurisdiction.

As regards the Court of Military Appeals, the only situation in which I can imagine that they would sit outside of the District of Columbia would be under a very extraordinary set of circumstances where it was impossible to sit here.

Mr. WHITE. But why would it be impossible to sit anywhere in the continental United States?

General HARVEY. I cannot imagine such a set of circumstances, sir.

Mr. WHITE. Under the wording of the administration's bill there's no place in the world that you couldn't go if you had a base there because that's where your jurisdiction is. Am I correct on that?

General HARVEY. That is correct, sir.

Mr. WHITE. I just wanted to make that point. My time is up.

Mr. Hillis.

Mr. Hillis. I had a couple of questions. I think you've covered them. Many of the points that I had in mind have been raised by other members.

Is there any jurisdiction for administration of the military justice system under the court of appeals, in other words, the flow of cases, or the backlog of cases? Do you exercise any administrative control

of the system if you get a bad judge or a slow processing of cases? I think the Supreme Court now and the Chief Justice exercises some of this sort of housekeeping, administrative control.

Mr. GILLIAT. Do you mean within the court itself, the Court of Military Appeals itself?

Mr. HILLIS. Within the framework of the court, yes.

Mr. GILLIAT. Yes; I think the court as a whole establishes its own rules, and it has, of course, a chief judge who serves in an administrative role in carrying out the decisions.

Mr. HILLIS. Is there a need to codify any of this in the legislation, what the procedures will be or what the responsibilities will be?

Mr. GILLIAT. No; I think traditionally that's left to the courts, other courts, and that would be consistent to leave that discretion to the Court of Military Appeals.

Mr. HILLIS. Is there any action needed in that area?

Mr. GILLIAT. I don't believe so. I have not heard of any problem in that area.

General Reed, do you know of any?

Mr. HILLIS. The problem being more in bad precedents?

Mr. GILLIAT. I'm not aware of any. I think the court carries a heavy load and works very hard on it.

Mr. HILLIS. The precedent of law in the military is different from the Federal and judiciary, generally.

Mr. GILLIAT. I don't think that's a matter of administration. There may be a difference in legal views and in judicial philosophy, perhaps, in some cases.

Mr. HILLIS. Yes. I think you made that point, Admiral McDowell.

Admiral McDOWELL. Yes. I could give you examples of that type of case, but I don't think that that problem involves the administration of the court itself. As Mr. Gilliat said, precedent really comes out to, I guess, a matter of judicial philosophy.

Mr. HILLIS. I know within the Federal system there's been instances where some of the courts function in a different manner in different districts. The case load handled was considerably different, and, of course, it became necessary to streamline administrative supervision. I think we have that now. I was trying to see whether there was an overlay of necessity in the military system.

How many cases generally are handled in the system? Have you ever seen any figures on that?

Mr. GILLIAT. The number of cases handled by the Court of Military Appeals?

Mr. HILLIS. Yes.

Mr. GILLIAT. Yes, we do have figures on that.

Mr. HILLIS. And the time frame, from the time a case is transferred?

Mr. GILLIAT. The Court of Military Appeals in 1978, the figures I was reading before, had 1,814 petitions for grants of review, and granted review in 430 cases, which is about 24 percent, and they acted on 394 cases on the master docket, which is the docket case of mandatory appeals, cases certified by the Judge Advocates General, and cases heard upon grant of an accused's petition for review. These resulted in 67 signed opinions, 12 per curiam opinions, and 315 summary dispositions.

Mr. HILLIS. Can you give us the same figures for 3 years ago, for 5 years ago, and for the last 10 years?

Mr. GILLIAT. Yes. There is an annual report. We can provide those. These are the most recent available to us.

Mr. HILLIS. Would you provide those figures on the workload?

Mr. GILLIAT. Yes.

[The following information was received for the record:]

WORKLOAD OF THE COURT OF MILITARY APPEALS

Time period	Petitions for review filed by the accused ¹	Cases certified to the court by the Judge Advocates General	Other filings ²
1. 3 yr ago (Oct. 1, 1976 to Sept. 30, 1977).....	2,061 (354)	19	142
2. 5 yr ago (Oct. 1, 1974 to Sept. 30, 1975).....	1,399 (91)	18	100
3. 10-yr total (July 1, 1968 to Sept. 30, 1978) ³	15,358 (2,413)	178	812

¹ The number of cases in which the court granted review are indicated in parentheses.

² Primarily petitions for extraordinary relief.

³ Official figures for 1979 not yet available. The figures shown do not include the 3-mo period of July to September 1974 because such figures are not separately available.

Mr. HILLIS. I wondered why the five judges, for example, unless there had been an increase in the workload.

Mr. GILLIAT. I don't think that that will affect the ability to handle the workload, adding the two judges. I think that we'll have the same problems. We'll have to work with the same efficiencies as the current court of three judges.

Mr. HILLIS. What's the theory of that?

Mr. GILLIAT. They don't sit in separate panels. So that five judges hear 394 cases, or decide 394 cases, as opposed to three judges deciding 394 cases. If anything, it could be requiring greater efficiency because they have to exchange drafts with two other judges and have discussions. I'm sure our judges can perhaps talk about that later.

Mr. HILLIS. I think that's all I have, Mr. Chairman. Thank you.

Mr. WHITE. Thank you, Mr. Hillis.

Any further questions of the panel?

[No response.]

Mr. WHITE. Two questions that I'm going to pose quickly: Why not seven judges? Then you'd have three and four to split up when they are overloaded.

Mr. GILLIAT. Five is the ABA standard.

Admiral McDOWELL. Minimum.

Mr. GILLIAT. Minimum, and I agree. It could be seven or nine. You could certainly argue for that. But five would seem to be about right. At least we ought to see whether five doesn't work well before we go on to any larger number.

Mr. WHITE. You have one point in the bill that the administration has proposed, and the same in the House bill, that there is no limitation on the time in which the court must act to determine whether or not it's going to review a case, but leaves it up to the rulemaking power, which means it leaves it up to the arbitrary action of the court and they might not get around to it or they may make their rule language very tenuous. Further, if they had a period in which to act, then an accused would know where he was.

Mr. GILLIAT. I guess I would not want to assume that they were going to act arbitrarily. I think they would act reasonably, as they

the past, and I think this is within the tradition of how courts their own activity.

WHITE. Would one of the other gentlemen wish to comment

ral McDOWELL. We have not seen that as a problem with the of Military Appeals.

WHITE. Fine.

here any further questions?

HOLT. May I ask just one more on this size?

u're appointed for a full 15-year term, in other words, if you away with the unexpired term and serve the full term, that o a long way in solving the problem. Right?

GILLIAT. We hope so. Yes, we believe so.

HOLT. Why do you think that five would be a good number? een talking all around that this morning. But do you think u would be bound to get two guys who could get together on inions if you had five?

GILLIAT. I guess, we have three, and one goes—

ral McDOWELL. With three you have a "swing man." Sure, say that with five judges you can get a two and two split, but nces are better with a five-man court that you won't get that wing man" philosophy that happens with a three-judge court lit two to one.

HOLT. Have you studied any courts to determine if that's true bodies to determine that that's the way humans behave when together in fives?

al REED. The ABA has studied this problem in appellate and they have looked at numbers, and five, I think, is the m of their recommendation. In fact, I think their optimum , as I recall. So we have looked at the ABA studies on this, ink five is their minimum recommended number for an appel- rt.

HOLT. I know how difficult it is for us to get two people around have the same opinion, and so I have an aversion to just in- g the numbers. So I would hope that it had a sound basis.

GILLIAT. Yes.

WHITE. I'm sorry to prolong this. I want to go into this retire- oblem again, if I may.

ill, at least the bill that we have in the House, provides retire- the age of 65 or 10 years' service, and tracking the Tax Court n apparently. Otherwise, you can retire at 65 with 15 years of

But if you retire after 10 years of service what's your ent?

my next question is: Can you retire earlier than 65 and then 65?

GILLIAT. There are four bases for retirement under the Tax system: At age 70; at age 65 with at least 15 years of service court; at the end of a 15-year term if the judge is willing to reappointment but is not reappointed; and by reason of per- disability. If the judge falls within one of the four categories, ge is eligible for retired pay at the time of departure from rt. The amount of retired pay is equivalent to the pay of a in active service, except that if a judge with less than

10 years of service retires—by reason of disability or at age 70—the amount of retired pay is reduced by a statutory formula. If a judge resigns before achieving eligibility under the Tax Court's system, then the judge will come under the civil service retirement laws. The Civil Service System requires at least 5 years of creditable civilian Federal service for eligibility. Under the Civil Service System, a person is not eligible for an immediate annuity except under the following circumstances: at age 55 with 30 years of total creditable Federal service; at age 60 with 20 years of such service; and at age 62 with 5 years of such service. A person who resigns before age 62 with less than 20 years of service does not receive an annuity until age 62. In computing the years of service, credit for service on the court is allowed only to the extent that a civil service retirement contribution was withheld from salary during service as a judge, or to the extent that the required contribution was later paid into the civil service retirement fund. The civil service annuity is computed based upon a formula that applies a percentage against the person's highest annual salary for 3 consecutive years of service. The percentage, which varies with the number of years of service, ranges from 7.5 percent for 5 years of service to 80 percent for 42 years of service.

Mr. WHITE. Suppose on my second question you retire when you're 55 years of age with 10 years' service. Then when you reach 65 do you get two-thirds? In other words, you have a vesting with 10 years' service?

Mr. GILLIAT. The only way you can retire at 55 would be a situation in which you would have served for 15 years and were available to serve the additional 15 years and were not reappointed.

Mr. WHITE. In other words, there is no vesting then?

Mr. GILLIAT. There is no vesting for a judge who retires under the Tax Court System. If a judge elects to participate in the court's system, the judge may claim any funds previously contributed for civil service retirement.

Mr. WHITE. You get the contribution back. That would be different from the Civil Service System which says you vested 5 years and you draw accordingly with the number of years you've had in.

Mr. GILLIAT. By precluding eligibility for the courts program unless a judge serves 15 years, there is an incentive to serve the longer period. The problem was raised before about people taking the job for a 15-year term and then leaving before the term expires. So this does stimulate or serve as an inducement to remain for the 15-year period. If the judge resigns before reaching eligibility under the court's program, the judge may be eligible for an annuity under civil service if the age, time-in-service, and contribution requirements are met.

Mr. WHITE. On the Federal Bench you have to be 70 before you get that, correct?

Mr. GILLIAT. Yes. That's mandatory under the Tax Court's System.

Mr. WHITE. Mandatory. And earlier than that you have to be 65 with 10 years. Am I correct on that?

Mr. GILLIAT. Yes; I think there's a 70 mandatory retirement in this bill. I'm not sure that there is for the Federal Bench. I don't know if there's any mandatory term for the Federal Bench. Do my colleagues know? I don't believe there is any mandatory term.

Mr. WHITE. We'll ask the judges on that.

Counsel, did you have a question?

Mr. HOGAN. I just have one, if I may. Thank you, Mr. Chairman. In order that our record may be clear on the retirement provisions, would gather that, although the retirement provisions did not appear in the administration's bill as it reached the Congress, at the working level with draft legislation the Judge Advocate Generals supported the retirement provisions. Is that a correct assumption, at the time that the draft was being considered within the Department?

General HARVEY. That is correct, Mr. Counsel.

I presume you are asking for our personal opinions.

Mr. HOGAN. Your personal opinions, yes.

General HARVEY. In my personal opinion, I think it is essential that the retirement provision be in the package.

Mr. HOGAN. General Reed?

General REED. I support that. We need improved retirement provisions, and those we would personally recommend them.

Mr. HOGAN. Admiral McDowell?

Admiral McDOWELL. I previously for the record have stated my personal agreement.

Mr. HOGAN. Admiral DeWolf?

Admiral DEWOLF. I would agree, Mr. Hogan.

Mr. HOGAN. You would agree.

Do you want to comment on that, Mr. Gilliat, or would you rather pass?

Mr. GILLIAT. For the record, as I'm sure you know, Mr. Counsel, there is a Presidential Commission on Pension Reform which is studying the whole area, and apparently anticipates a report in 1981, and for this reason it was not deemed advisable at this time to propose piecemeal changes in retirement programs, and that's the reason the bill does not contain such a proposal. This is not to suggest that we don't think it was a good idea, but, I would tend to agree, that there is some virtue in considering it part and parcel of an entire issue of how this country is going to establish and run its retirement systems.

Mr. HOGAN. Do you know how many prospects there are for postponing that report after 1981?

Mr. GILLIAT. No; I am not aware of that.

Mr. HOGAN. Thank you, Mr. Chairman.

Mr. WHITE. Thank you, gentlemen. We appreciate your testimony. At this time we would ask that Judge Fletcher and Judge Cook please come to the witness table.

Judge Fletcher, I understand you have a statement. Do you prefer to summarize it or read it in full, as you wish?

Judge FLETCHER. I would prefer to summarize it, with your consent.

Mr. WHITE. Without objection, your entire statement will be placed in the record. Please proceed, sir.

STATEMENT OF HON. A. B. FLETCHER, JR., CHIEF JUDGE OF THE U.S. COURT OF MILITARY APPEALS

Judge FLETCHER. Of course, it is the court's pleasure, and I think I speak for both of us, to be here testifying on this, what we consider, a very important bill.

But before getting into the bill and maybe as an answer to some of your questions, let me go into some statistics through fiscal year 1979 which may give a basis for the workload that has been talked about by the other gentlemen who have appeared today.

During the 1979 fiscal year there was an average of 30 cases a week filed. This led us to a total workload, including the backlog, of 2,300 cases filed and in court. In addition thereto, because of the nature of our court, we had 600, almost 700, motions filed, which required the action of each judge individually. In 1979 we had three judges. Since that time Judge Perry has gone to the district court in South Carolina. At present there is just Judge Cook and Judge Fletcher sitting.

During the first 3 months, or first quarter, of fiscal year 1980 there were 350 additional cases filed and motions totaling approximately 150 were filed.

We have made the comparison in our report that we have submitted to you, and I would like to do so today, to the supreme courts of the several States because we more match this system in that we have been the highest court in a system with no appeal to the Supreme Court. Looking at that picture first, of the 26 State supreme courts that have intermediate appellate courts, as we do with the Courts of Military Review, we have the fifth largest docket. The courts that are higher in total docket count have a minimum of seven judges.

Now looking at the circuit courts—and this is rather difficult because we are a cert court, in effect, as opposed to an automatic appeal court in the circuit sense—the three judges in our court, by judge number per caseload, did the work of seven judges in any of the circuits now sitting, in any of the 10 circuits now sitting.

What comes in is only half of the question. The other half is what goes out the door. During 1979 we sent out 30 cases a week. In 1980, interestingly enough, we have sent out 40 cases a week, Judge Cook and I. But I must point out that we are just really keeping even, and this really takes a toll. It takes a toll not only of energy from the judges and its good staff, but I think the toll shows up in our work product, inadequate time for research, writing and gathering of information to formulate our opinions. Not that I would step back from any of our opinions. I think they could be improved with more time and effort allowable to reach decisions, and then I think in many instances we miss many important questions just out of sheer time. We have to sort of pick the areas we're looking at, without looking at the total scope of military justice, and attempt to answer those in some priority ranking.

As to court administration, I will cover this area.

Let me state at this time Judge Cook and I have gotten together and we've sort of divided up the two bills. So that we won't be repetitive, I'm going to cover some of the areas and Judge Cook is going to cover others, and I believe as of yesterday we were in mutual agreement as to both our statements to some degree. Your questions may show a difference though, lady and gentlemen.

The problem with administration, as sheer numbers of the court, has pretty much been taken care of by the court's use of technology and of education of personnel on the court so that matters do move through the court rather rapidly. But I think I can state honestly that we both wish we had more time for review of certain questions.

three-judge court—and it's been stated here; I merely sort of go it—the big problem is continuity and consistency. The judge and the share the administration's view and what I refer to as Mr. White's bill that the court needs to be increased to five judges. The big problem is vacancy, when there is a vacancy, and maybe because of the judicial philosophy works during the last 5 years the number of decisions coming out of our court was approximately 75 percent. Twenty-five percent of the decisions that we put out had either a dissent or a concur in the result.

Now, where you have a vacancy created in the court—and there has been this division—this just merely revives the questions coming up now for the new three-member court, to see if there's been another good man, I believe that's the point Admiral McDowell made. I think with five judges, lady and gentlemen, we can just come closer to reaching a majority decision, although I well realize some of the experiences of the U.S. Supreme Court in this area.

But let me show you. In 1979 there were 18 cases that went out of court, full opinions, where we could not reach any unanimity of opinion that provided any guidance for the lower court. What we did was at least two of us, agree upon the result. But how you arrive at the result was reached in three different patterns.

When we had, besides the vacancy problem, illness and, of course, the usual problem in a very important decision, jury selection methods, whether it be random or otherwise. It happened in that case I recused myself because of some import or for reasons that I believe were necessary having been adjacent to Fort Riley, Kans., when they used that particular method.

It hasn't stopped us, lady and gentlemen, having a vacancy, but I state honestly that it has slowed us down. It's very difficult to find cases, where we have different legal philosophies in certain areas, for mere selection of cases to be heard by the court so that we can just get them moving through.

Under the bills, both bills, a quorum is a majority of the court. So a vacancy wouldn't stop the court from proceeding if you had five judges. It is a difficult problem right now, and, I think, our workload. Now we add to continuity, and this really goes to both bills. There is no question that a 15-year appointment would add to continuity, we would support this, both in the administration's bill and in White's bill.

One short example: We have a vacancy now. If a person was appointed judge under the present legislation, the term of office would be 15 months, with no reassurance of reappointment, of course.

We believe that, in addition to the 15 years and bringing true continuity to the court, a type of retirement similar to the Tax Court.

That's as far as I'm going on this because this is an area that Judge Cook is going to talk about.

In both bills we are pleased to see that you have eliminated the political party criterion and have gone to judicial competence because that just is a better yardstick.

Before I leave this area, I think the proposals made by the White bill and by the administration's bill, with the exception of retirement, which we think is essential, all fall within the guidelines of the American Bar Association, and I believe my brother judge has even at-

tached to his statement certain American Bar Association resolutions in this area.

As I said earlier, our Court is well staffed. If it wasn't well staffed we couldn't operate. We have excellent employees. I said we've used technologies for case flow.

While I am talking about our staff, and because we as judges want to protect them, we prefer the verbiage in the White bill, where it sets up the retention, or the grandfather, so to speak, under the Customs Court, in identical language, as I recall, to the Customs Court. Even though maybe the words of art of the administration bill do this, I will be quite frank, as a lawyer, it is difficult for me to see that it does. But there is no question in the White bill that this particular matter is resolved as to grandfathering in on employees.

The Court has supported, or I have supported for 5 years since I took the Bench, certiorari to the Supreme Court. I don't think any court, whether it be military or otherwise, should be above the law of the land as set by the Supreme Court of the United States, and I think review is essential to that court.

As you know, under the two bills I believe, it allows review by the Supreme Court in cases involving the death penalty, matters certified by the Judge Advocate Generals to our Court, and cases where our Court grants relief or grants a petition for review.

I have two comments in this field.

First, I think under the present bill—and maybe this was the intent—you leave in the largest number of cases which will go to the Supreme Court the decision as to what will reach the Supreme Court in the U.S. Court of Military Appeals, for if we do not grant a petition then it cannot be, under the law, petitioned for cert to the Supreme Court no matter what our decision happens to be in the case. This is, quite frankly, lady and gentlemen, contrary to the American Bar Association standards relating to the judicial administration.

The second problem, or concern—it's not a problem; it's only a concern—that I have is that the proposal to have certiorari to the Supreme Court was that it would eliminate collateral attack. In this instance, where we grant approximately 27 percent of the petitions, that means that approximately 74 percent are denials, and, therefore, if there is to be relief sought by the appellant, or petitioner, he will have to once again use the collateral route through the district courts and proceed up that way.

Let me make two comments:

In both bills—and I want to state on behalf of the judges that we appreciate your leaving in the code committee—this is invaluable to a civilian judge or a civilian coming on this court. It gives him an area of exchange of concepts and ideas, and I think I can say without contradiction that it has been advantageous to the present judges sitting on the court and that the Judge Advocate Generals of the services have provided us with information in detail which has made our work much easier.

Second, I think you have cured a possible fault in the system in providing for constructive service on the appellant of the decision of the courts of military review. This was vacant, or lacking, in the original code, and it's absolutely essential, so that we can have time certain from which we can judge when our actions or his actions are necessary to be

aken. This is a great improvement, lady and gentlemen, and I congratulate you on this particular concept, and on the total bill.

Thank you once again for letting me talk with you.

My brother judge will cover some other areas, and then I'm sure we'll attempt to answer questions. If we can't answer then we'll write opinions and mail them to you.

Thank you.

WRITTEN STATEMENT OF THE HONORABLE ALBERT B. FLETCHER, JR.

Mr. Chairman and Members of the Committee: It is a pleasure to appear before you to testify concerning H.R. 6298 and H.R. 6406.

Before getting into the specifics of the two bills, I thought it might be helpful to the Committee to briefly review the Court's present and projected workload. I should also note that, because of Judge Perry's appointment to the U.S. District Court in South Carolina, the Court of Military Appeals has been operating with only two judges during all of fiscal year 1980. We fully expect a significant increase in filings with the appointment of a new judge. This, in fact, occurred shortly after my appointment and again occurred following Judge Perry's appointment.

suffice it to say that the Court's workload remains extremely heavy. During the 1979 term, the number of filings averaged over 30 new cases per week. Coupled with cases already on hand, this represented a workload for the Court of almost 300 cases last year. During the first quarter of the 1980 term, there were an additional 350 filings. As the Court noted in last year's Annual Report to the Committee, this meant that the Court's filing rate was the fifth highest in the country when compared with the 26 state supreme courts which are organized with intermediate appellate courts. These state supreme courts more nearly approximate the operational structure of the military justice system than do the federal circuits since the Court of Military Appeals was established to serve as a court of last resort for the military justice system, much as a state supreme court fulfills that role in the various states.

Compared with the federal circuit courts' workload, however, our filing rate is over two and one-half times greater than that of the average three-judge circuit panel during fiscal year 1979. Stated somewhat differently, our three judges had the equivalent workload of more than seven federal circuit judges during the 1979 term.

Filings are only half the story, of course. During the 1979 term, the Court disposed of well over 30 cases a week. This was more than six times the termination rate of the average three-judge federal circuit panel. Judge Cook and I have increased this termination figure to almost 40 cases a week during the first quarter of fiscal year 1980.

H.R. 6298 and, to a greater extent, H.R. 6406 constructively address many of the problems which have plagued the Court since its inception. Briefly, I would like to address, on behalf of the Court, a few points covered by these bills, with particular emphasis on the Court's organization, the Court's administration, and the certiorari proposal for Supreme Court review. Judge Cook then will cover the other matters. Both of us are in general agreement with all of the recommendations which we are jointly presenting, and we both would be happy to address any other matters in which the Committee may be interested. We have divided up the bill's sections between us merely to avoid repetition.

The Defense Department study of the Court last spring correctly observed that continuity and consistency have been a thorny problem for the Court for many years. I share the Administration's view that increasing the Court's size to five judges would enhance consistency by reducing the effect of judicial turnover on the decision-making process. With a three-judge Court, virtually every vacancy requires a reexamination by the litigants of every matter previously decided by a divided Court. During the past five years, the number of split decisions probably approaches 75 percent.

Five judges also would significantly enhance the Court's ability to reach a majority decision. For example, during the 1979 term, there were 18 cases in which the Court did not even reach a decision which provided guidance to the lower courts. The difficulties presently being experienced as a result of the vacancy on the Court further highlight the drawbacks of a three-judge court of last resort.

In addition to vacancies and illness, recusal problems also have rendered the three-judge Court ineffective on several occasions, most recently in the important area of jury selection methods. A combination of all these factors is what led the American Bar Association to recommend in its Standards for Appellate Courts that no appellate court should have less than five judges. Of the 26 state courts of last resort to which I have referred, only one presently has less than five judges. Its workload was less than half that of our Court. Our heavy workload, to which I already have alluded, is yet another reason supporting an increase in the number of judges.

With regard to continuity, I am not sure the Administration's proposal does much to eliminate the revolving door insofar as the Court's judicial turnover rate is concerned. Certainly, the full 15 year term will help. However, the present retirement system remains a significant drawback to most qualified candidates. As the DoD study noted last spring, the Court's retirement program "has little to offer a person with sufficient legal experience to qualify for a judgeship, who has not otherwise accumulated substantial prior government service." In the Court's view, a combination of additional judgeships and an adequate retirement system would provide better overall stability for the future, both in terms of judicial turnover and decisional stability. For that reason, we believe Mr. White's proposal is preferable. We also are pleased to see the elimination of the political party criteria for selecting future judges. Judicial competence is, the Court believes, a far better yardstick.

Turning to the administration of the Court, you will note that both bills establish the Court as a separate judicial entity, much like the Tax Court. The Court's present staff is well-qualified and several employees are thoroughly-trained in court administration. In addition, the Congress already has provided the Court with most of the funding necessary to implement a state of the art computer system which will become operational in May of this year. It is capable of handling our present management information system and word processing needs. What additional services we cannot provide in-house, we will handle by contract. My discussions with our staff as well as with Defense Department officials do not suggest that there are any insurmountable problems in this regard.

I would like to briefly address section 3(b)(3) of the Administration's bill, the savings clause for the Court's present employees. It was intended to preserve the civil service rights and privileges of all present members of the staff. I think they deserve this protection. Unfortunately, the present language technically does not provide any legislative protection for the attorneys on the Court's staff. For that reason, the Court views as preferable a savings clause along the lines of that previously enacted for the U.S. Customs Court. See 28 U.S.C. § 871. Such a provision is included as part of the Court of Military Appeals bill sponsored by Mr. White.

Finally, let me turn to the certiorari proposals for Supreme Court review. Personally, I have supported certiorari review in some fashion since I was first appointed to the Court. No Court should be above the law of the land as set by the Supreme Court of the United States. As part of the Code Committee, the Court unanimously endorsed Supreme Court review of constitutional questions. Both of the bills before you opt for a somewhat different approach to Supreme Court review. This approach allows review of cases which involve the death penalty, cases which one of the Judge Advocate Generals wishes the Court to review, and other cases in which the Court of Military Appeals either grants relief or grants a petition for review.

My comments will be two-fold. First, in some instances, this certiorari approach allows the Court of Military Appeals, rather than the Supreme Court, to decide which issues and cases ultimately get to the Supreme Court. The American Bar Association Standards Relating to Judicial Administration suggest that the court of last resort should pick its own cases for review. When you allow a lower court to decide what the highest court can and cannot review, you have significantly increased the likelihood of judicial abuse which is, after all, the very reason for Supreme Court review in the first place.

My second concern with the certiorari process which has been proposed is that it does little to eliminate collateral attacks on military justice decisions. However, unless our Court grants a petition for review, the accused, in almost every instance, still would have to file for a writ of habeas corpus in federal district court and then pursue his appeals through the entire Article III court structure. From the outset of the DoD study of military justice, elimination of

cumbersome and costly collateral attacks was viewed as a key reason for certiorari.

I thank you for this opportunity to comment on these two important pieces of legislation. I would be happy to try and answer any questions you may have.

Mr. WHITE. Thank you, Judge Fletcher.

Judge Cook.

Judge Cook. I have a written summary of a longer statement that I've submitted for the record.

Mr. WHITE. Without objection, your entire statement will be placed in the record.

STATEMENT OF HON. WILLIAM H. COOK, JUDGE OF THE U.S. COURT OF MILITARY APPEALS

Judge Cook. Mr. Chairman, I will summarize my written statement, and I will be pleased to answer any questions you, or any other member of the subcommittee, or counsel, may ask. My written statement deals with two major points:

As to the first point, the two bills before you materially affect the U.S. Court of Military Appeals and the military justice system. Chief Judge Fletcher and I, at present the only two active judges on the Court, have discussed both bills. I have also had a number of discussions with others knowledgeable in the field of military law. I am convinced that the bills provide needed changes in the court and will improve the administration of the military justice system. I recommend enactment of the proposals for change that appear in both bills as to the organization, jurisdiction, and administration of the court and for review of a court decision by the U.S. Supreme Court.

One aspect of the proposed change in the court's jurisdiction deserves special mention. Under existing law, a case affecting a general or flag officer, approved by a service appellate court, is automatically reviewed by the U.S. Court of Military Appeals. Some students of military law regard this provision for automatic or mandatory review as a special privilege conferred upon admirals and generals. The U.S. Court of Military Appeals and the Federal civilian courts have upheld this provision as constitutional. The U.S. Court of Military Appeals pointed out in its opinion that general and flag officers have such unique responsibilities in effectuation of the military mission as to justify a different basis of appellate review from that provided for others in the Armed Forces. I would not, and I am certain that no member of this subcommittee would not, want to denigrate the importance of the special responsibilities of general and flag officers.

Both bills before this subcommittee would eliminate the present provision for mandatory review. I have pondered long and intensively the possible meanings that might be attributed to a change in this jurisdiction. Since only two cases affecting a general or flag officer have come before the Court in the 30 years that the code has been operative, I am convinced that substitution of a petition for grant of review for the automatic or mandatory review would not diminish the stature of the general or flag officer, or injure the military mission. I, therefore, recommend the proposed change without reservation.

As to the second point of my statement, the major difference between

H.R. 6298 and H.R. 6406, it is so important that I am impelled to strongly recommend that the subcommittee approve the White-Holt bill, rather than the bill submitted by the administration.

H.R. 6298 contains no provision for retirement and annuity benefits for a surviving spouse of a judge of the U.S. Court of Military Appeals; therefore, it leaves the present program in force. H.R. 6406 provides for a retirement and annuity program for a judge of the Court like that of the judges of the Tax Court.

The Organic Act of the U.S. Tax Court and the U.S. Court of Military Appeals declares that each is created by Congress under article I of the U.S. Constitution. These courts are, therefore, called "legislative courts," and are distinguished from those courts established by Congress under article III of the Constitution, such as the Courts of Appeals and U.S. District Courts. In the same category as the Tax Court and the Court of Military Appeals are the territorial courts, the newly created bankruptcy courts, and the courts of the District of Columbia. A judge in each of the other legislative courts has a better retirement and annuity program than a judge of the Court of Military Appeals.

Under the existing retirement system, a judge of our court who has no other Federal service, would, at the end of a 15-year term, receive retirement pay of approximately 26 percent of his average salary for his highest 3 years of earnings. The annuity for a surviving spouse is predicated upon that percentage. This is unlike the Tax Court, which receives 100 percent after 15 years of service.

After a comprehensive survey of the court from its beginning, in 1951, to the present, the Acting General Counsel of the Department of Defense advised Congress that the court has had so large a turnover rate in judges that a "situation of uncertainty in the law" had been created, with resultant "substantial problems for both the Government and the accused." The last two vacancies on the court were created by the resignation of a judge in order to accept appointment to the U.S. district court, at a lesser salary but with a more attractive retirement and annuity program.

I believe, and I respectfully suggest to the subcommittee, that the provisions of H.R. 6406 as to retirement and annuity for a surviving spouse will be a decisive disincentive to resignation before completion of the term for which a judge is appointed. In turn, reduction in the turnover rate will promote stability in the administration of justice.

The retirement provision in H.R. 6406 is inseparable from the change in the position of a retired judge that the bill proposes. Currently, a retired judge may become a senior judge and can be called to active service with his consent. H.R. 6406 would make a senior judge subject to call to active service at the discretion of the chief judge of the court for 90 days a year; and, if the senior judge refuses that call, he will forfeit 1 year of his retirement pay. I believe that this extension of the obligation to perform judicial duty, in time of need, is sound, but it should be required only if the retirement provided by H.R. 6406 is enacted into law.

At this point I want to just ad lib for a minute and say that we are not only getting something by the White-Holt bill; we're giving up something by it. At the present time, a retired senior judge, of the court is entitled to an office in a Federal courthouse of his choice and

a grade 9 secretary for life. A grade 9 secretary receives between \$17,000 and \$22,000 a year; added to this is the cost of the office space in a Federal courthouse.

Both bills take those entitlements away, and I endorse that. But I think that probably, at least in my case because I have an appointment which will allow me to get 80 percent of my salary on retirement, it would actually be cheaper for the Government under the White-Holt bill than it is under the present system.

I am aware of the enormous problems that now confront the subcommittee, and I acknowledge, with deep thanks, the subcommittee's effort to further the improvements in the military justice system that are proposed by these bills.

Thank you.

WRITTEN STATEMENT OF JUDGE WILLIAM H. COOK

The bills before the Subcommittee this morning propose to change, materially, the composition, the authority, and the internal administration of a court created by Congress 30 years ago. I am a judge at that Court. What I say about the bills, therefore, may be perceived to be influenced by how the proposals affect me. I think it important to tell you at the outset that I believe, and am convinced, that my personal circumstances in regard to the Court are such that no provision confers so large a personal benefit or disadvantage as might reasonably be thought to influence my recommendations.

The United States Court of Military Appeals is a three-judge court, but since last October, it has had only two judges. This situation came about because, for the fourth time since 1973, a judge voluntarily left the Court before the expiration of his term of office. The magnitude of the turnover in judges is one of the reasons the bills are before you.

Chief Judge Fletcher has informed you of his general endorsement of H.R. 6406 over H.R. 6298 and of the reasons for his approval of particular provisions, such as that increasing the number of judges from three to five and that enlarging the time of an accused to appeal to the Court from 30 days to 60 days. I, too, endorse H.R. 6406 over H.R. 6298 for essentially the same reasons, and I recommend approval of it by the Committee. I have separate comments, too, on two subjects: (1) Elimination of mandatory review by the Court of a case affecting a general or flag officer; and, (2) retirement and annuity for a judge of the Court.

1. Mandatory Review Jurisdiction

Section 2(a) of both bills changes existing law on the mandatory review jurisdiction of the Court. By present law, the Court must review a case in which the sentence as affirmed by the service Court of Military Review affects a general or flag officer. That provision is not carried forward in the proposed delineation of the Court's jurisdiction, except as to a case in progress at enactment of a bill.

Current law distinguishes between a general and flag officer and all others of the uniformed services. The Court upheld the constitutionality of the differentiation in *United States v. Gallagher*, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965); and the constitutionality was sustained in the Federal civilian courts in *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir. 1966), cert. denied 385 U.S. 881 (1966).

Before my appointment to the Court, I served for many years as a counsel on the staff of the House Armed Services Committee. From that vantage, I came to know the military community almost as intimately as a member; and I agreed with the Court's declaration, in *Gallagher*, 15 U.S.C.M.A. at 395, that the "overall importance in command, direction and achievement of victory" set the general and flag officers "apart [from others] within the military establishment." Since my appointment to the Court, I have not had such intensive exposure to the military community, but, in furtherance of my statutory responsibilities as a judge to report to Congress on the operation of the Uniform Code of Military Justice, I periodically visit military installations in the United States and foreign countries. I continue to believe in the *Gallagher* perception of the special status of the general and flag officer. I would, therefore, be troubled by a proposal that could be construed as a signal to deny the reality of the special nature of the responsibilities of these officers.

I acknowledge the existence of a persistent feeling among serious students of military law that the present mandatory review provision can be perceived as a special privilege to general and flag officers, rather than a recognition of their special responsibilities. The idea of equal justice under law is deeply ingrained in American thought; and, courts have often had to avoid the appearance of evil as much as the evil itself. A few years ago, I concluded that mandatory review could be eliminated, and, thereby, dispel the disquiet of those who saw it as invidious discrimination, without injury to the general and flag officers or risk to the military mission. My principal reason was the rarity of a court-martial proceeding against a general or flag officer. In the 30 years that mandatory review has been in effect, it has brought only two cases [*United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 437 (1958), and *United States v. Grou*, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953)] to the Court I, therefore, endorse elimination of mandatory review by the Court of a case affecting a general or flag officer.

2. Retirement and Annuity for U.S.C.M.A. Judges

Presently, the Uniform Code of Military Justice has no specific provision on retirement rights of a judge or on survivor annuity for a spouse. As a result, a judge is eligible only for those benefits provided by the ordinary Civil Service retirement program.

A judge with no previous Federal service, who completes a 15-year term and is not reappointed, will receive only about 26 percent of his average salary for the three highest years of his earnings. That amount is reduced by about 10 percent if he elects to provide a survivorship annuity for a spouse or dependent child. A surviving spouse or dependent child would, on the judge's death, receive 55 percent of the judge's retirement pay.

H.R. 6298 contains no provision on retirement and annuity. It, therefore, continues the present system. I respectfully submit that the present system is so different from those Congress has provided for other legislative courts created by it that it seriously disadvantages the Court as an institution.

A staff committee in the office of the General Counsel of the Department of Defense made a comprehensive study of the Court from its inception in 1951, to 1979. In a memorandum titled "Reform of the Court of Military Appeals," it noted that the Court had experienced severe turnover in judges. In his letter of transmittal of the draft of H.R. 6298 to the Honorable T. P. O'Neill, Jr., Speaker of the House of Representatives, the Acting General Counsel of the Department of Defense said that the frequency of turnover had "introduced substantial instability and unpredictability into the military justice system," which, in turn, created an "uncertainty in the law" that generated "substantial problems for both the government and the accused." For myself, I do not perceive the consequences of the high level of turnover to be as grave as depicted, but destabilization effects cannot be denied. I have no doubt that the high turnover rate is directly attributable to the absence of an equitable retirement and annuity system. I believe the cause and effect relationship is apparent from the fact that the two most recent vacancies on the Court resulted from resignations by the incumbents to accept appointments to the United States District Courts at a lesser salary, but with a better retirement.

In addition to its adverse impact upon the Court as an institution, the present retirement system seriously disadvantages the judges. The benefits are markedly less than those granted to judges of every other legislative court created by Congress, specifically, the United States Tax Court (26 U.S.C. § 7447); the territorial courts (28 U.S.C. § 373); the bankruptcy courts (5 U.S.C. § 8339) (with consideration now being given to expanding the benefits to those of the territorial courts); and, the courts of the District of Columbia (D.C. Code § 11-1564).

H.R. 6406 extends to judges of the United States Court of Military Appeals, retirement benefits like those of the judges of the United States Tax Court. The specified conditions and terms impress me as equitable and as reasonably likely to eliminate the ill effects of the present system. I, therefore, respectfully recommend its enactment into law.

A judge's retirement does not deprive the Court of his services in time of need. Under present law, a judge receiving retired pay may become a Senior Judge. That status allows him a staff assistant and an office, and, with his consent, subjects him to performance of judicial duties. Senior Judge Homer Ferguson has responded to two such calls for varying periods. With some modification of the present law as to the occasions for a call to active service and as to the duration

of a call, Section 943(g) (1), Article 143(g) (1), of H.R. 6298 continues the current law; however, H.R. 6406 effects a significant change. Under its provisions, a judge receiving retired pay may be called to perform judicial duties without his consent, and for periods of time specified by the Chief Judge, which, however, may not exceed 90 days in any calendar year.

The proposed changes for a Senior Judge are, I believe, justified. Indeed, the improvement in retirement and annuity benefits provided by the bill warrants recognition, in time of need, of a duty to serve beyond the term of appointment. I endorse this part of the bill, and recommend its enactment. However, I view extension of responsibility as part of the retirement provision, and it should not be enacted without that provision.

Other matters of great importance press for the attention of Congress. Many of those matters are either directly or indirectly concerned with the Armed Forces. Both bills before the subcommittee will, I believe, markedly improve the Government of the Armed Forces. I believe H.R. 6406 does more than H.R. 6298 toward achieving the needed improvements, and, I, therefore, unreservedly recommend that the Subcommittee approve H.R. 6406.

APPENDIX

In August 1979, the following resolutions were approved by the American Bar Association House of Delegates, thus rendering these resolutions the official position of the Association.

I. "Be it resolved, that the American Bar Association supports retention and strengthening of the Court of Military Appeals and opposes efforts to abolish it or merge it into other courts."

II. "Be it resolved, that the American Bar Association supports the strengthening of the Court of Military Appeals by (a) providing full fifteen-year terms for all judges appointed to the Court and (b) by revising its retirement system to make it equal to that of other Article I courts."

III. "Be it resolved, that the American Bar Association (a) supports creation of appellate jurisdiction in the United States Supreme Court to review decisions of the Court of Military Appeals upon writ of certiorari and (b) opposes the creation of jurisdiction in the United States Court of Appeals to review the decisions of the Court of Military Appeals."

Mr. WHITE. Thank you, Judge Cook.

Mrs. Holt.

Mrs. Holt. I have no questions, Mr. Chairman. The gentlemen have presented their case comprehensively and excellently and have answered all of my questions.

Mr. WHITE. Thank you, Mrs. Holt.

Mr. Won Pat.

Mr. Won Pat. Thank you, Mr. Chairman.

I am interested in learning more about the retirement.

You are appointed for 15 years or 10 years, is that correct?

Judge Cook. Under the present system both Judge Fletcher and I were appointed to unexpired terms for someone who had died or who had resigned from the Court. I now happen to have a full 15-year appointment.

Both bills that are now before you would make all appointments for 15 years, except that at the time this bill is enacted, any judge who doesn't have a term for 10 years will have his term extended to 10 years and also a judge for one of the two newly created positions will get a 12-year appointment; then everybody thereafter will be appointed for a 15-year term.

Mr. Won Pat. In other words, you can serve more than 15 years?

Judge Cook. You can offer your services, and if the President wants to reappoint you, you can serve, provided the Senate consents.

Mr. Won Pat. If you serve 15 years how much retirement do you get?

Judge COOK. Twenty-six percent at present.

Mr. WON PAT. Just 26 percent?

Judge COOK. That is correct.

Mr. WON PAT. What's the present salary of the judges?

Judge COOK. Of course, there's some court action involved, but we get the same as you do, sir, \$60,800.

Mr. WON PAT. Retirement is defined by the age and I suppose by the number of years of service?

Judge COOK. There are two sections relating to that, sir, in the White-Holt bill. You either have to be age 65 with 15 years of service, age 70 with 10 years of service, or if you are not reappointed, at any age, after having served a complete term, or have offered yourself for reappointment but were not reappointed, then you would get full retirement. This is similar to the Tax Court legislation.

Mr. WON PAT. We have several Federal judges in the District Court at Guam, for example, and the Commonwealth of the Northern Marianas. They are all Federal judges.

Judge COOK. They receive, sir, under the statute, full pay after 15 years, upon reaching age 65, and 10 years after reaching age 70. Then they can retire at full pay.

Mr. WON PAT. However, they are appointed to only an 8-year term.

Judge COOK. Yes, sir. But after 15 years they are able to get their retirement if they are of a retirement age.

Mr. WON PAT. I see.

Judge COOK. And the retirement statute says that after serving 15 years they can retire at age 65, after serving 15 years.

Mr. WON PAT. Thank you, Judge.

Thank you, Mr. Chairman.

Mr. WHITE. Thank you, Mr. Won Pat.

Mr. Hillis.

Mr. HILLIS. No questions.

Mr. WHITE. Judge, I would like to ask both of you a few questions on the same subject.

Judge COOK talked more about the retirement system. And since that was your area of division, I would like to ask you a few questions.

To reiterate what you said, I think you said if a man is not reappointed and has evidenced his desire to be reappointed he is then able to retire.

Judge COOK. After 15 years of service.

Mr. WHITE. After 15 years of service?

Judge COOK. Yes, sir.

Mr. WHITE. Regardless of the age?

Judge COOK. Yes, sir.

Mr. WHITE. What's the minimum age for appointment to the bench?

Judge COOK. There's no minimum age to my knowledge. There will be a maximum age in the bills we are considering today in that no one could be appointed after reaching the age of 65.

Mr. WHITE. Sixty-five.

Mrs. HOLT. Will the gentleman yield?

Mr. WHITE. Yes.

Mrs. HOLT. I think you meant to say a man or a woman. [Laughter.]

Mr. WHITE. Yes, of course. Any time I say "man" I mean person.

Do you have to be an attorney?

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ge Cook. Yes, sir.

WHITE. A practicing attorney?

ge Cook. Yes, sir, and a member of the bar of the highest court State.

WHITE. Suppose a man or a woman should retire from the bench 10 years' service but is not 65?

ge Cook. If he just voluntarily leaves, as I read the bill, he would be entitled only to the retirement that he would get under the civil service retirement plan, which would probably be 6 percent.

WHITE. That would be inviolate, then. He would take the high 10 times the number of years, plus his military?

ge Cook. That is correct. The only exception to that would be a disability-type retirement, sir, and then they would get 10 percent

WHITE. On the disability, does he then draw whatever percent his disability, or does he draw 100-percent disability?

ge Cook. If he had served for 10 years, he would get 100 percent. If he served for 5 years, he would get 50 percent. It's based on the number of years that he had served.

WHITE. Five years 50 percent?

ge Cook. Yes, sir.

WHITE. Regardless of his disability?

ge Cook. His disability would have to be an incapacitating disability which precludes his service on the Court.

WHITE. Now going to the area of certiorari, is certiorari permitted to the Supreme Court on the initiative of the Court as well as on the initiative of the litigants?

ge FLETCHER. No, on the litigants. The litigants would so move.

WHITE. Why can't the Court ask for certiorari if you have a question on an issue? Why shouldn't the Court ask? Because here we have a situation where you've been involved in real questions of law and you haven't had the opportunity of guidance from the Supreme Court. Why shouldn't you have the right to in that instance request a review by the Supreme Court?

ge FLETCHER. I don't know of any court in the system, Mr. White, that would do that. Generally, let's say that Judge Cook and I were to reach a conclusion that we would put out an opinion where there is a performance and reversal. Where you have a division in a court of appeals, generally the lower court is upheld, and if that be the case, you would still have the appellant, in effect, filing for the writ of certiorari.

WHITE. Either of the parties.

ge FLETCHER. Yes, either of the parties. That's true.

WHITE. Would file the writ of certiorari.

ge FLETCHER. Yes, either of the parties, because where you have a divided court you generally go back to the lowest court where there is a proper majority decision.

WHITE. I see a problem with your suggestion, although there are times when I see that Judge Cook and I would have liked to have used it. That is, if you have the Supreme Court then giving protected opinions, dissenting opinions, this type of thing, which the court avoids, and which I avoid, in fact, I think is prohibited by law from doing.

Mr. WHITE. In your decisions do you refer to common law or are you guided strictly by military law?

Judge FLETCHER. We are guided by the code primarily, the Constitution, and the manual for courts-martial, and if we cannot find it in there then we resort to Federal common law, if there be such a thing.

Mr. WHITE. At any point in a military trial, if one of the litigants, especially the defendant, should raise the question of constitutionality, may he then get a review by the Supreme Court directly without going through the chain as you may in a civil court on the constitutionality question?

Judge FLETCHER. No. He would have to collaterally attack it in the Federal district court and then move up that chain.

Mr. WHITE. Why should he be able to go ahead then in a civilian court to get the question of constitutionality determined without having to go through the process of trying to work his way up to the ultimate court?

Judge FLETCHER. As I appreciate it, Mr. Chairman, even in the article III system he still works himself up. It may move faster, but for the Supreme Court to take direct cert—they have done it—on constitutional questions is rare.

Mr. WHITE. But they can?

Judge FLETCHER. But they can. But, of course, all he has to do under our present system is to slide over into the article III courts, file his writ, and then if his proposition is good enough, if he is overruled and if his proposition is good enough they could pick it up in the article III court.

Mr. WHITE. Do you have, in making your decisions, the use of computer analysis of precedents?

Judge FLETCHER. Not computer analysis. We have electronic input which gives us all cases which are on this certain point. Then we must go to read the cases. We are tied in with the justice system.

Mr. WHITE. I understand it's not going to do your thinking for you, but I just wondered if you had a computer analysis.

Judge FLETCHER. There are times we wish we could press a button though.

But we do have that. We are connected up with the Justice system, which has cataloged all of our cases in the system.

Mr. WHITE. I don't recall if you addressed it. Did you address the question of a five versus a seven-man and/or woman court?

Judge FLETCHER. No. I think our preference has been the minimum of five judges, based upon the American Bar standards, and I might state that in our last report to this august body all three judges, Judge Perry sitting at that time, also agreed that the court should be enlarged to five judges.

I think seven judges would be just as handy, except, looking from a very practical side, I believe our present structure where we now reside as a court, at 5th and E Streets, could handle five judges and the necessary staff. I think if we went to seven judges it would be impossible to handle it in our present structure, and I think that very practical side of it took us to the five judge standpoint.

Mr. WHITE. Thank you.

Are there any further questions of the members?

[No response.]

Mr. WHITE. Counsel?

Mr. HOGAN. I have no questions.

Mr. WHITE. Thank you very much, Judge Fletcher and Judge Cook. appreciate your coming before us today.

We will be considering this bill as early as we can, and may be drawing on your expertise further in this respect.

Judge FLETCHER. We'll reply, sir. Thank you.

Judge COOK. Thank you, Mr. Chairman.

Mr. WHITE. Thank you, sir.

Mr. HOGAN. May I have permission to insert documents in the record?

Mr. WHITE. Yes. Without objection, counsel will be permitted to insert documentation at the end of the record, and any members who have any questions they wish to refer to the witnesses to be answered within 10 days, they may do so and it will be placed in the record without objection.

[The following information was received for the record:]

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Wheat's Direct Number

February 7, 1980

Honorable Richard C. White
Chairman, Subcommittee on Military Appeals
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

For almost three decades now, the American Bar Association has been an active and visible participant in efforts to achieve, maintain and enhance the quality of justice administered within our Armed Forces; the Association can point with pride to its support for virtually every piece of major legislation affecting military justice, from the enactment of the Uniform Code of Military Justice itself in 1951 down to the most recent amendments to the Code in the latter half of 1979. It is with this long tradition in mind that I am taking this opportunity to express to you the support of the Association for the central concepts embodied in the "Military Appellate Procedure Act of 1980."

As recently as August, 1979, the American Bar Association went on record in its support for the retention and strengthening of the Court of Military Appeals and in opposition to any efforts to abolish that Court or merge it into any other Court of the federal judiciary. Beyond registering its general endorsement of the Court and its role within the larger context of the military justice system, the Association's House of Delegates further supported specific proposals for the establishment of full fifteen-year terms for all judges appointed to the Court and the creation of appellate jurisdiction in the United States Supreme Court to review decisions of the Court of Military Appeals upon writ of certiorari. We are happy to note that the proposed "Military Appellate Procedures Act of 1980" incorporate substantial measures compatible with the Association's policies in the respects. We firmly believe that the enactment of these proposals into law will do much to place the Court of Military Appeals in a position to discharge the larger function envisioned for it by the framers of the Uniform Code of Military Justice, and we commend all efforts to achieve this landable end.

On behalf of the Association, I feel constrained, however, to draw your attention to one serious deficiency of the proposed legislation.

The enlargement of the Court from its present membership of three to five judges; the creation of certiorari power in the Supreme Court; and the provision of full fifteen-year terms for all judges appointed to the Court are measures designed (in the words of the "speaker letter" of January 2, 1980) to enhance "the stature of the Court" and to eliminate features of the existing law which have led to

"substantial instability and unpredictability [in] the military justice system." In our view, the achievement of these goals would be more certain and assured by the addition to the proposed legislation of provisions creating a separate retirement system for the judges of the Court of Military Appeals, comparable at a minimum to the substantive benefits of the retirement provisions made for the judges of the United States Tax Court. So strong, in fact, is the Association's commitment in this regard that, at its Annual Meeting in August, 1979, it adopted as the policy of the Association the proposal that the Court's present retirement system be revised to make it equal to that of other Article I courts of the United States.

The policies underlying this position of the American Bar Association can be stated briefly. The present pension program of the Court of Military Appeals is tied to that available for career executive branch employees. Accordingly, if a prospective appointee to the Court does not have a substantial amount of prior government service, the retirement system now in effect will hardly be attractive to qualified candidates and may well reduce the number of qualified persons available for appointment to the Court. Admittedly, the retirement system now in effect for federal Article III judges is keyed to the concept of life tenure and is not, therefore, appropriate to the United States Court of Military Appeals. A more suitable model is, in our judgment, provided by the retirement system of the Tax Court which is - like the Court of Military Appeals - an Article I court and which is composed of members appointed to fifteen year terms. That system is tied to Civil Service for general purposes of administration but not for purposes of establishing eligibility or the rate of retirement compensation. Thus, the Association has endorsed the concept that the Court of Military Appeals should have for its judges a retirement system which is equal in benefits to that of other Article I courts such as the Tax Court. By so doing, the attractiveness of appointment to the Court would be enhanced and the members of the Court would be less inclined to seek other posts before the completion of their terms.

The proposed "Military Appellate Procedure Act of 1980" will, if adopted, represent a significant milestone in the evolution of the Court of Military Appeals and a notable improvement in the overall quality of American military justice. We feel, however, that the laudable objectives of this legislation will be more surely and speedily attained by the incorporation in it of the proposals we made, and we ask your careful consideration of them.

Sincerely yours,

E. R. Lanier

E. R. Lanier

ERL:cyn

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cc: Subcommittee Members

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON MILITARY JUSTICE AND MILITARY AFFAIRS

February 7, 1980

Honorable Richard C. White
Chairman
Military Personnel Subcommittee
Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Court of Military Appeals Act of 1980

Dear Representative White:

Thank you for this opportunity to present the views of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York (the "Committee on Military Justice"), with regard to the proposed "Court of Military Appeals Act of 1980."

The Committee on Military Justice believes that the Court of Military Appeals Act (the "Act") merits enactment into law.

In the Committee's view, the proposed expansion of the number of judges, as well as the provision for fifteen-year terms for those judges, will significantly improve the continuity and predictability of decisions of the Court of Military Appeals. Of particular importance is the likelihood that a five-member Court will not experience abrupt shifts in judicial philosophy as a result of the replacement of a single judge.

The existence of an adequate retirement system would be a valuable factor in attracting highly-qualified persons to serve as judges of the Court.

The Committee on Military Justice supports Supreme Court review of decisions of the Court of Military Appeals en banc or certiorari. This will allow speedy resolution of important legal questions that merit consideration by the Supreme Court. An opportunity to appear before the Supreme Court may also be useful in retaining able attorneys on active military service.

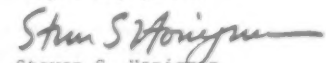
In one respect, the Act may be improved. Many members of the civilian bar have a deep professional interest in military justice. For example, the Committee on Military Justice has prepared a comprehensive "Bill to Improve The Military Justice System," and has offered testimony at the recent hearings regarding the amendments to Articles 2 and 31. However, it has often been difficult for the civilian bar to join in deliberations regarding the military justice system. The administration of the military justice system would benefit from participation by the civilian bar on an institutional basis, just as members of the bar serve as members of the judicial conferences of the Circuit Court of Appeals. To that end, we recommend that proposed section 101(e) of the Act be amended to provide for participation by three or five civilian members of the bar of the Court of Military Appeals in the annual comprehensive study of the administration of the Uniform Code and the preparation of reports and recommendations pursuant to that study.

In addition, we recommend that, in the interests of military justice, the Court of Military Appeals be empowered to appoint a civilian attorney or bar association to participate

in an appeal as amicus curiae, and that compensation for such service be available pursuant to the standards set forth in 18 U.S.C. §3006A.

Finally, we believe that the Court of Military Appeals Act is only a first step in military justice reform. The Military Personnel Subcommittee should undertake a comprehensive reexamination of the Uniform Code of Military Justice in the near future. Important questions regarding the proper role of the commanding officer in military justice, the composition and selection of military juries, and streamlining military appellate procedures should be considered by Congress.

Very truly yours,


Steven S. Honigman

Chairman, Subcommittee
on the Uniform Code of
Military Justice

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FLEET RESERVE ASSOCIATION

Representing All Enlisted Personnel of the
U.S. NAVY ☆ U.S. MARINE CORPS ☆ U.S. COAST GUARD

1303 New Hampshire Avenue, N.W., Washington, D.C. 20036 • (202) 785-2768

7 February 1980

Honorable Richard C. White
Chairman
Subcommittee on Personnel
Armed Services Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Fleet Reserve Association appreciates the opportunity to present its position on the matter of revising the laws governing the U.S. Court of Military Appeals. As you know, we represent 148,000 career enlisted, and former enlisted now serving in a commissioned status, personnel of the United States Navy, Marine Corps and Coast Guard. It is our privilege to express full support for the measure to allow for the appeal of decisions of the U.S. Court of Military Appeals to the United States Supreme Court, the certiorari review. It is because that under the current law, the U.S. Court of Military Appeals must grant a petition for review before the accused may pursue an appeal without having to go through the federal district court that we believe the new proposal is needed. This means the accused must go through an expensive and time-consuming review process. The proposed legislation would correct this and we wholeheartedly support it.

There are two other points before this Subcommittee concerning the U.S. Court of Military Appeals which we wish to address. They are the increasing number of judges on the Court and the pending of an equitable retirement and survivor benefit for members of the court. The Fleet Reserve Association is of the opinion that these two points, if corrected, would do much to improve the Court's stability and to reduce the backlog of pending cases.

Under current law, a judge of this Court is eligible for the retirement benefits provided by the Civil Service retirement program. The drawback to this practice is that unless a judge is reappointed to this Court he will receive about twenty-six percent of his average high three salary for his fifteen year tenure on the Court. This means that his survivor annuity would be fifty-five percent of his reduced retirement. Surely, this is not equitable with the provisions afforded the judges of other legislative courts over which the Congress provides for. It would appear to us, as laymen, that an equitable retirement and survivor benefit plan would greatly reduce the turnover of the U.S. Court of Military Appeals judges and enhance the Court.

We thank you for the opportunity to present our views which fully support the provisions we have addressed.

With best wishes for your continuing success I remain, in

Loyalty, Protection and Service,

Robert W. Nolan
ROBERT W. NOLAN
National Executive Secretary

BMN:eb

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NATIONAL CAPITAL OFFICE

NON COMMISSIONED OFFICERS ASSOCIATION of the UNITED STATES OF AMERICA

FEB 20 1980

STRENGTH IN UNITY

110 Maryland Ave., N.E., Box 43
Washington, D.C. 20002Telephone (202) 546-7891
546-7892

February 17, 1980

Honorable Melvin Price, M.C.
Chairman, Committee on Armed Services
U.S. House of Representatives
2120 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The Non Commissioned Officers Association of the U.S.A. (NCOA) extends its endorsement to the bill, H.R. 6298, "to amend the Uniform Code of Military Justice to establish the United States Court of Military Appeals as an independent court under article 1 of the Constitution of the United States."

The Association favors the necessity to increase the Court from 3 to 5 members, but would hope the committee will consider amending the bill by inserting a provision requiring the appointment of at least one, but no more than two, former commissioned officer of the Judge Advocate General's division to the court.

Judicial prudence demands that the court be knowledgeable of the law as it applies to both accused as well as the accuser. Lately, the Court of Military Appeals has leaned heavily in favor of the accused, seemingly without considering the military viewpoint. The appointment of a former JAG officer will lend greater credence to the Court and, perhaps, provide a more logical expertise in the application of military law.

Sincerely,

C.A. "Mack" McKinney
Vice President for Government Affairs

Mr. WHITE. There being no further business before the subcommittee, the subcommittee is now adjourned.
[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]

MARKUP

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
MILITARY PERSONNEL SUBCOMMITTEE,
Washington, D.C., Thursday, March 6, 1980.

The subcommittee met, pursuant to notice, at 2:20 p.m., in room 2337, Rayburn House Office Building, the Hon. Richard C. White (chairman of the subcommittee) presiding.

[Following meeting on H.R. 6569, to amend the Military Selective Service Act to allow the registration of both men and women.]

Mr. WHITE. We are now meeting for the purpose of marking up H.R. 6406, which would amend the Uniform Code of Military Justice to revise the laws governing the U.S. Court of Military Appeals and to provide for review of decisions of such court by the Supreme Court.

The Chair now lays before the subcommittee H.R. 6406, and I ask the counsel to read the title and explain the nature of the bill—the background on it—and synopsize the testimony we had before us, on February 7, 1980.

Mr. HOGAN. It's a bill to amend title 10 of the United States Code to revise the laws governing the U.S. Court of Military Appeals, to provide for review of such decisions by the Supreme Court, and for other purposes, and among the other purposes it would provide a retirement plan that is similar to the article I courts such as the Tax Court, Mr. Chairman.

The bill was considered recently in a subcommittee hearing where we had the Assistant General Counsel for Manpower, in the Office of the Secretary of Defense, as well as the three Judge Advocate Generals and the Chief Counsel of the Coast Guard, and also Chief Judge Fletcher and Judge Cook of the court. Judge Fletcher and Judge Cook spoke favorably on the entire bill.

The administration bill is similar to H.R. 6406, except it does not contain the retirement provisions which, I understand, were in the final draft in the Defense Department but was removed in the Office of Management and Budget. Chairman White and Mrs. Holt introduced H.R. 6406 with those retirement provisions.

We worked closely with the Judiciary Committee which has some jurisdiction because of the certiorari provisions in the bill which would allow appeal to the Supreme Court by both the defendant—or the "accused" as he's called—or the Government.

Mr. Rodino and Mr. Kastenmeier joined in sponsoring H.R. 6406.

The testimony was rather extensive. There was considerable questioning about whether or not we should have five judges rather than three, and I think the subcommittee generally accepted the proposition that one of the major problems with the Court of Military Appeals has been created by rapid turnover, or sporadic turnover, is even bet-

ter to say, which, because of philosophical differences, has created problems where there are only two sitting members.

The American Bar Association has studied the matter at length, as well as the bar of the city of New York, and the Federal bar, and they have approved this legislation with particular reference to the five-member court, and the provision for certiorari to the Supreme Court, giving the accused the opportunity, as well as the Government, to have constitutional issues litigated beyond the Court of Military Appeals.

Mr. WHITE. Counsel, your explanation is very helpful, but let's go section by section and then we can explain it section by section and find out if there are any amendments to each section.

The Chair opens section 1, on page 2, line 1 through 11. This is merely a reference to a chapter.

Mr. HOGAN. That's right.

Mr. WHITE. Is there any amendment to section 1? [No response.]

If not, then we will move to section 2. Section 2 is "Jurisdiction of the Courts of Military Review and of the Court of Military Appeals." Now, I think that your explanation now would be most helpful in accordance to that section.

Mr. HOGAN. The provision in the current law striking out "a flag or a general officer" was made because others in the military system do not have this automatic review in the Court of Military Review in that regard so that everybody would be now treated alike, whether it's a flag officer or a private first class.

Mr. WHITE. Before a general or a flag officer, regardless of his offense, would have to be reviewed.

Mr. HOGAN. That's right.

Mr. WHITE. And now, if we make this change—

Mr. HOGAN. Everybody is treated alike. The department saw no reason to differentiate between them in this review. And I might say, all of this was approved in the services.

Mr. WHITE. All right. That would carry from line 12 through 23 of page 2.

Are there any amendments thereto?

[No response.]

Mr. WHITE. If not, let's go to page 3, "Review by the Court of Military Appeals; applications to the Supreme Court for writs of certiorari."

Mr. HOGAN. This I have commented on earlier. There is no provision in present law for review upon writ of certiorari to the Supreme Court. The only way that an accused could get into the Federal system was through collateral attack, usually by extraordinary writ, going through a Federal district court and up through that channel. Habeas corpus was the usual type.

Over the years there have been complaints about this inability to go from the Court of Military Appeals to the Supreme Court. Both the petitioner—the petitioner could be the accused or the defendant—and the petitioner could also be the Government.

Mr. WHITE. So there are no advisory requests. It would be strictly by the moving parties.

Mr. HOGAN. Either the Government or the accused.

Mr. WHITE. Are there any amendments to that portion of section 2 on page 3, going down through line 24?

[No response.]

Mr. WHITE. There being no amendments, we will go to page 4—

Mr. HOGAN. The first one is a clerical amendment, Mr. Chairman.

Mr. WHITE. Explain that, please.

Mr. HOGAN. This is just putting a heading in the code which is indicated "Review by the Court of Military Appeals; applications to the Supreme Court for writs of certiorari," so that title 10, chapter 47, would have this heading on it.

Mr. WHITE. Without objection—

Mr. HOGAN. There is a savings provision next with regard to the flag or general officers. Those who have cases in the mill, in effect, would still be entitled to automatic review.

Mr. WHITE. Are there any amendments to that portion of section 2, going down to line 15 on page 4?

[No response.]

Mr. WHITE. Let's move on to section 3.

Mr. HOGAN. This is pretty much a repetition of what we have in the present law relative to the Court of Military Appeals as far as status is concerned.

Mr. WHITE. What are the changes? The five judgeships?

Mr. HOGAN. No, it's just a restatement of the law, in effect.

[Conference with Mr. Eifron in audience.]

Mr. WHITE. I'm sorry. It takes out the DOD language. What was done later on in the bill is remove the court from the Department of Defense and leave it as a separate entity, and this takes out "for administrative purposes," the "Court is, for administrative purposes, in the Department of Defense."

Mr. WHITE. This section does leave them in there?

Mr. HOGAN. No, it takes them out.

Mr. WHITE. But lines 11 and 12, that's the change of membership.

Mr. HOGAN. I was only addressing myself to article 141, Mr. Chairman.

Mr. WHITE. All right.

Mr. HOGAN. And then for judges under article 143, would have a change in membership, and there is a situation here that is different, apart the numbers. The original law stated that the judges—no more than two of the judges could be from the same political party. That was deleted from this bill because, to my knowledge, there are no other judicial appointment provisions that have that type of language in them.

Mrs. HOLT. Mr. Chairman?

Mr. WHITE. Yes, Mrs. Holt.

Mrs. HOLT. I would like to offer an amendment at that point at the proper time.

Mr. WHITE. All right. I'll tell you what we'll do—are there any amendments to article 141 or article 142?

[No response.]

Mr. WHITE. There being none, then we will go to article 143. Is that an amendment that you wish to offer?

Mrs. HOLT. Yes, Mr. Chairman. I'd like to offer an amendment—staff is handing them out now—at page 5, line 15, strike out "solely" and at page 5, line 16, strike out "No" at the beginning of that sentence and insert "Not more than three of the judges of the court may be ap-

pointed from the same political party, and no" and go on with the other restrictions on it.

I think it has worked well to have some representation of both political parties on the court and I see no reason to change it, simply because we're changing the number.

Mr. WHITE. Is there further discussion?

Mr. KAZEN. What is the present provision on that subject?

Mrs. HOLT. Than no more than two—

Mr. HOGAN. No more than two of the three.

Mrs. HOLT. In other words, you can have two Democrats and one Republican.

Mr. KAZEN. Or two Republicans and one Democrat.

Mrs. HOLT. Well, yes, if we ever became a majority.

Mr. KAZEN. But not more than three—

Mrs. HOLT. That's what I mean.

Mr. WHITE. In other words, in any event, no more than a majority could be from any one party, and by increasing the size of the court, she would increase it to three.

Mr. WON PAT. Presently there are three?

Mr. WHITE. There are three members of the court now, and no more than two can be from one party.

Mr. WON PAT. And now we increase it to five?

Mr. WHITE. Five, but we have removed in this bill the requirement that no more than three can be from one party, and Mrs. Holt seeks to restore that provision.

Mr. WON PAT. Restore the original language?

Mr. WHITE. Restore the requirement that no more than a certain number be from one political party.

Mr. NEDZI. Why was the provision stricken in the first place, Mr. Chairman?

Mr. WHITE. Well, the testimony at the time was that they wanted to make it nonpolitical; that they felt this was not needed, but obviously, there are members of the subcommittee who feel it should be retained.

Further discussion?

[No response.]

Mr. WHITE. If not, then the question is on the motion by Mrs. Holt. All in favor, signify by saying aye.

[Chorus of "Ayes".]

Mr. WHITE. All opposed, signify by saying no.

[No response.]

Mr. WHITE. In the opinion of the Chair, the ayes have it and the motion carries.

My recommendation is that we go a little bit longer, about 5 minutes more, and then we will recess.

That amendment was in—

Mr. HOGAN. Article 143.

Mr. WHITE. Yes; on sub (b). Are there any further amendments to article 143?

[No response.]

Mr. WHITE. There being none, then we will go on to article 144.

Mr. HOGAN. There is one more change that we hadn't gotten to.

Mr. WHITE. What is that?

Mr. HOGAN. On page 6, sub (c), Mr. Chairman.

The term of office of any judge of the Court of Military Appeals shall expire 15 years after the judge takes office.

Under the present law, if a judge retires before his term of office is up, then the appointee—the new appointee—only serves the unexpired term. Under this provision, the new appointee would serve a full 15-year term.

Mr. WHITE. What are the advantages of the change?

Mr. HOGAN. Well, the problem exists as of right now. We have a vacancy on the court and the unexpired term is 18 months, and it just doesn't seem to be a reasonable thing to appoint a judge for 18 months, and then there is the possibility he wouldn't be reappointed.

Mr. WHITE. There has been a big turnover in this particular court.

Mr. HOGAN. And this sort of a thing has created a rather significant problem because of turnover. That's all that remains there of any note, Mr. Chairman, and article 144 is next.

Mr. WHITE. Let's ask first, are there any members who have any amendments including any change of this particular provision?

Mr. WON PAT. I just want to ask a question. In the original appointment, isn't it staggered?

Mr. HOGAN. It was originally, Mr. Won Pat, back in 1950. They went for 5, 10 and 15 years, they presumed a rotation. So the original appointments were staggered, and the original law provided for that, but since then it's been amended, so you don't see that in the present law. But that's how they got the system going. But due to deaths, early resignations and early retirements, the situation has been rather difficult because of the appointment to the unexpired term.

Mr. KAZEN. Mr. Chairman, let me ask this. There will be five members of this court. What is wrong with appointing one of them every 3 years for a period of 15 years so that you may have continuity on the court?

Mr. HOGAN. Well, at the present time, we have a staggered situation already—

Mr. KAZEN. Every 5 years, among the three.

Mr. HOGAN. No; it hasn't turned out that way, Mr. Kazen.

Mr. KAZEN. I know, because of the vacancies. But why can't we set a term of 15 years for five judges appointed at 3-year intervals.

Mr. HOGAN. Well—

Mr. KAZEN. I'm not arguing with you. Can that be done?

Mr. HOGAN. All we have to do is change the law. But I don't see that it's necessary, and we would like to get the two new members—

Mr. KAZEN. Why not?

Mr. HOGAN [continuing]. The two new members on there as quickly as possible.

Mr. KAZEN. This is true, but after the initial appointment—

Mr. WHITE. Mr. Kazen, let me point out this. This may still incur the same problem we've had. A number of the members have been appointed to upper judiciary positions, circuit court of appeals, and so on. If you give them the continuity of 15 years, then you will still have the hiatus there of a very short time, and you would have a hard time attracting people out of whatever other position they had. That's the problem.

Mr. KAZEN. Yes, Mr. Chairman. I hadn't thought of that, but that is true.

Mr. WHITE. Are there any further changes in this section?

[No response.]

Mr. WHITE. If not, then we will go to article 144. Tell us, please, what changes—by the way, I should go back. Are there any other changes? Does this language track?

Mr. HOGAN. This pretty much tracks what's in the—just about exactly tracks what's in the present legislation.

Mr. WHITE. I think that's important. Now article 144.

Mr. HOGAN. In article 144: Organization, there's one change there that I should note. This was commented on in the subcommittee hearing.

Mr. WHITE. What's that?

Mr. HOGAN. "The principal office of the Court of Military Appeals shall be in the District of Columbia." There was some problems about that language. You have somewhat similar language in the current legislation.

Mr. WHITE. They objected to it being there?

Mr. HOGAN. No. There was some question in the subcommittee about it, about subsections (d) and (e):

Sessions of the Court of Military Appeals shall be held in the District . . . but where jurisdiction . . . is exercised by the Armed Forces.

The principal reasoning—

Mr. WHITE. Will the gentleman hold? We are going to recess, and I hope you all can return so we can complete this bill and report it out.

Mr. HOGAN. The principal reason for that is they usually sit for motion sessions for admission to the court in places other than Washington.

Mr. WHITE. But the language here is "the principal"?

Mr. HOGAN. Yes.

Mr. WHITE. Are there any amendments?

[No response.]

Mr. WHITE. At this time, the subcommittee will recess and resume following this current vote.

[Recess taken.]

Mr. WHITE. The subcommittee will resume.

At the time we recessed, we were considering article 144, "and I believe I asked if there were any amendments to 144 and there were none at that time. So we will proceed to 145 which pertains to procedure. Will counsel please advise us of any changes from the existing law in this particular provision?"

Mr. HOGAN. Between lines 4 and 17, this addresses the right of the accused to petition the court, and the accused, by this amendment, now has 60 days rather than 30 days—at line 8—and also, there is a clarification of the service on the accused, of the Court of Military Review, the court below, from which he's petitioning to the Court of Military Appeals.

It's "the date on which a copy of the decision of a Court of Military Review is deposited with the U.S. Postal Service for delivery to the accused by certified mail," and so forth, so that there is now no question as to his getting notification, whereas before, it was fuzzy whether he got it directly or through his counsel or in some sort of uncertain fashion.

Mr. WHITE. What was the language of the previous law?

Mr. HOGAN. I would have to dig that out, Mr. Chairman.

The accused has "30 days to be notified by a decision of the Board of review to petition to the court. The court shall act upon the petition within 30 days."

Well, what's the service? You don't know. He may say, "I never heard from them. I never got my decision," and the clerk of the Court of Military Review would say "Well, oh yes, we gave a copy of the court's decision to your counsel." There have been questions, therefore. This is intended to clarify it.

Mr. WHITE. That's not as certain on the accused as an actual delivery to himself or to the counsel. If he has a counsel of record, wouldn't it be better to say that date deposited or on his counsel? If he has counsel.

Mr. HOGAN. The problem is that oftentimes his counsel is in Washington, D.C., and the accused may be in Los Angeles, Calif., and he says, "I never heard from my counsel."

Mr. WHITE. Yes; but he may not have heard from the post office, either.

Mr. HOGAN. I don't know how you remedy it beyond that, Mr. Chairman. It's a question of constructive service.

Mr. WHITE. He would be more likely to know if his counsel is notified than if it's deposited in the post office.

Mr. HOGAN. All I can say is, that the Judge Advocate Generals and those involved with the problem, and particularly those in the appellate defense sections handling these cases, feel that as long as they have something such as this, it's satisfactory. This is what they recommend, for the constructive service on the accused; that's their consensus.

Mr. WHITE. Well, they've got more faith in the post office than I have.

Mrs. HOLT. Mr. Chairman, that would just be protection for the court. I mean, you've got to have some way for constructive service to be arrived at because if it was just the date on which the accused is notified, he could avoid that very easily.

Mr. HOGAN. One of the concomitant actions that was taken, Mrs. Holt, was to increase the time that he had in case there was any problem with the time lag between the date on which the copy was deposited with the Postal Service so that instead of 30 days he now has 60 days to make his petition. Of course, if you want to add to that and make it tighter—

Mr. WHITE. Well, for the protection of the accused, and if he has a counsel of record, I would think the accused would at least rather have the opportunity of his counsel being notified and to sign off—if that's what's required—than to trust to something deposited in the mail.

If I were the accused, I would be a little uncomfortable worrying about whether the mail is going to be delivered. It could happen, and then the man's out of luck. It could be sent to the post office, certified, and could get lost, and nobody knows then. Then he comes before it and says, "Well, I didn't have notice," and they say, "Look, it's been certified."

Mr. HOGAN. Well, it's certified mail.

[Confers with Mr. Effron.]

Mr. WHITE. We'd be happy to hear from you directly if—

Mrs. HOLT. Why don't you just speak up?

Mr. WHITE. We'd be happy to hear from you directly if you would stand up or come to the microphone.

Mr. EFFRON. The accused—

Mr. HOGAN. This is Mr. Effron who is from the Office of General Counsel at OSD [Office of the Secretary of Defense].

Mr. EFFRON. Thank you, sir. The accused, now, can and will be able to request that service be made on the counsel, and that is what provision (b) (1) is for. That's the question of the personal service, either on the accused or a person that the accused has designated to act in his or her behalf.

We may have situations in which an appellate action has begun and the accused is a.w.o.l. or has otherwise disappeared and is not available and will not have provided for any such service on counsel. Counsel may even have been appointed to act for the accused in the accused's absence. Perhaps, say, the court-martial has taken place, the court-martial is completed, and the individual is sentenced to confinement. The accused then goes a.w.o.l. and there's no way to complete the action at that point, even when the case has been completed.

Mr. WHITE. All right, I can understand that, but in the way it's worded now, the Government has the option either/or. It doesn't say that the accused should be notified or through his counsel or if that's not available, then through the other. It just says they have either/or. They can either deposit it by certified mail or they can notify the accused himself.

My point is, when you are talking about a quasi-criminal or a criminal action, which, in a sense, this is, I suppose—it could be—the advantages should be to the accused.

Mr. EFFRON. I understand that, sir. In terms of pointing out parallels to criminal actions, in the Federal system, of course, there is no requirement of any such personal notice. Once a mandate from a court has issued by that court, the burden is upon the accused to act. There is no requirement that there be that type of personal service. This is more advantageous than you have even in the Federal system.

Mrs. HOLT. Mr. Chairman, you've got to have some provision for constructive service.

Mr. WHITE. Well, I'm wondering if we couldn't say the date on which the accused is notified of a decision of the court of military review, or, if impractical to, then the burden rests with the Government to show it was impractical to give service on him.

Mr. HOGAN. Of course, my problem with that is, what does "impractical" mean, Mr. Chairman?

Mr. WHITE. I don't think that's too hard for the court to figure out. If the man is absent, it's not practical, or if he has no counsel of record, then certainly it's impractical. Whatever other words that you want to use, but this way I think that the advantage is with the Government and you know they are going to—in most instances—do it by certified mail.

Mr. HOGAN. The only other comment I have, as Mr. Effron says, this is unique.

Mr. WHITE. It may be, maybe they're not right. We are the ones making the law. Maybe the Federal courts should make that a little better in terms of equity for the accused. Once he's found guilty, then

he's going to have to serve his term, but he has to have every fair advantage in between.

Does anyone have any idea on this? Any thought on this?

Mr. WON PAT. No comment on that.

Mrs. HOLT. I think that the wording here, it is incumbent on the person who wants to petition the court of appeals for review to be aware of what's happening, and I think if he's avoiding that completely, then you've got to leave the court some opportunity for some kind of constructive service.

Mr. WHITE. Well, I don't object to constructive service as such. I understand they should exhaust their opportunities or their advantages to personally notify first.

Mr. HOGAN. Well, how about including a provision that his counsel of record should be notified—that the date on which the accused is notified by certified mail and the date upon which his counsel of record is notified, whichever is the later?

Mr. WHITE. That would be better.

Mr. HOGAN. Well, we can add in there—Mr. Effron suggests—to make it the same day so you won't have a date confusion. The date on which a copy of a decision of the court of military review is deposited—on which copies of the decision of the court of military review are delivered to the accused's counsel of record and deposited with the U.S. Postal Service.

Mr. WHITE. My suggestion is this language right here. What do you think of this? On line 13, after the word "accused," put "delivered to the accused and to counsel of record, if any, by certified mail."

Mr. HOGAN. The counsel of record—OK.

Mr. WHITE. Wouldn't that do it?

Mr. HOGAN. Well, if his counsel of record is appointed counsel and is in the same office, you've got to notify him by certified mail according to that. See, a good number of them, Mr. Chairman, have their Government counsel, military counsel, who are in the very same office with the Court of Military Review. Are you saying you want them notified also by certified mail?

Mr. WHITE. But a lot of them are not.

Mr. HOGAN. I understand that.

Mr. WHITE. If you are talking about differentiations and liquefying it, diluting it, then you are going to—

Mr. EFFRON. Sir, might I suggest that the same purpose could be achieved, consistent with Mr. Hogan's concerns, if you add in line 12, after "Court of Military Review," the following:

A copy of the decision of the Court of Military Review is served upon counsel of record and a further copy is deposited with the U.S. Postal Service.

The service could be provided for in rules of the court, similar to service in the courts that we deal with here, and there would be a record of service and that would be sufficient to take care of recording the fact that delivery had taken place without having to go through the expense and the administrative burden of certified mail.

Mr. WHITE. So you are saying that service is provided on counsel of record and on the defendant too. Give me the language again.

Mr. EFFRON. I would suggest after "Court of Military Review" on

line 12 "is served upon counsel of record and a copy is deposited"—I guess you would say "a further copy. And a copy is deposited"—

Mr. WHITE. Copy of the decision?

Mr. EFFRON. Copy of the decision.

Mr. WHITE. Is deposited?

Mr. EFFRON. Yes.

Mr. WHITE. OK. I so move adopting that. Is there objection?

[No response.]

Mr. WHITE. There being no objection, so ordered.

Is there anything further in that article 145?

Mr. HOGAN. No; there's not, Mr. Chairman.

Mr. WHITE. Then let's go to—

Mr. HOGAN. Administrative provisions, 146.

Over on page 10, at line 10, "Positions in the court"—this is new.

Positions in the court are excepted from the competitive service, and the incumbents of such positions shall [sic] occupy positions in the excepted service.

Mr. WHITE. You put a "shall" in there.

Mr. HOGAN. " * * * such positions occupy positions in the excepted service." I didn't mean to deviate, other than from the language which is new language, which takes them out of a civil service status and puts them into a court administrative personnel status, as with the Tax Court. This is basically Tax Court language.

Mr. WHITE. Is there any objection to that language?

[No response.]

Mr. WHITE. Any amendment to article 146?

Is that all the change in that section?

Mr. HOGAN. Yes, sir, article 147—

Mr. WHITE. Without objection, so ordered.

Mr. HOGAN. Article 147 on page 11, starts the whole new section on retirement and these are the new provisions that we discussed at length during our hearing. I can briefly indicate what the general provisions are taken out of the Tax Court provisions.

First, you recall that the present retirement provisions are like civil service, like the Members of Congress have or like the people in civil service have, which are not compatible with the 15-year appointment. This is the only court that has this type of retirement where you are under the civil service employment laws.

As you recall, during the testimony, the idea was to try to bring it in line with the Tax Court and the other courts to enhance the position and attract better people—so the retirement provisions would be one, they could retire at age 65 with 15 or more years of service on the court. Upon expiration of that 15-year period, provided they indicated to the executive branch that they were willing to serve another 15-year term, but reappointment was not offered, or if the judge became permanently disabled.

That is basically the Tax Court provision. Now, there are a variety of examples that I believe the members set during the hearing, and the answer to those various queries were supplied to the subcommittee and you have them before you.

Now the computation, the amount of retirement pay for the Tax Court, is based upon the ratio of the number of the years served on the court to the number 10 and applied to the pay of a judge, and

that's the maximum you can get. For example, let's say he served 15 years. You would have 15 over 10 times the pay, \$57,500 I think is the typical example—you correct me if I'm wrong, Andy [Effron], but you can't get the full 15, the most you can get is the \$57,500. The better example would be if there were disability provisions, and he was to be disabled. You say how much money would he get in retirement, and he served, let's say, 9 years, so he would get nine-tenths of \$57,500 as his retirement pay, and setting aside the years now because it's a physical disability retirement.

Basically what happens is, if he serves 15 years, he's going to get full pay.

Mr. WHITE. Why don't we go ahead and just start reading straight through.

Mrs. HOLT. You mean if he serves 15 years and retires, he'll get full pay?

Mr. HOGAN. Yes; full pay.

Mrs. HOLT. That's pretty high, isn't it?

Mr. HOGAN. All the judges get it, Mrs. Holt.

Mr. WHITE. Federal judges have to be 70 years of age before they can—

Mr. HOGAN. This provides for mandatory retirement at 70, retirement at 65 with 15 years, which is the Tax Court provision.

What's the Federal court, Andy?

Mr. EFFRON. The Federal courts, I believe you can retire at age 70 with 10 years of service and at age 65 with 15 years of service.

I would like to add that the position of the administration is that consideration of retirement reform should be postponed until the President's Commission on Pension Policy reports in 1981. If the committee so desires, I shall provide technical information on the impact of H.R. 6406.

The difference between this proposal and the article III retirement system, and the reason why the Tax Court has this system which, as Mrs. Holt said is quite generous, is that a judge on the Court of Military Appeals or the Tax Court serves a limited term. A judge may not be able to serve until age 70 even though willing to do so. A judge may be appointed at age 50 after an illustrious career as an attorney, come to age 65, be willing to serve for an additional term, but not be reappointed by the Executive. So that is why the provision is for full retirement at the end of a 15-year term, if not reappointed.

The proviso is in the legislation that the judge has to indicate to the Executive that the judge is willing to accept reappointment. If the judge says, "Well, 15 years, great, I'll go ahead and retire," then there would be no eligibility unless the other requirements were met.

Mr. WHITE. Let's read it line by line.

Mrs. HOLT. How much is this going to cost? Do you know?

Mr. HOGAN. The fiscal year 1981 estimated cost by CBO—Congressional Budget Office—was about \$300,000. That includes salaries as well as—of course, those early years, you are not going to get any retirements out of the system. They'd be retiring under the civil service plan.

Mrs. HOLT. How much did fiscal year 1980 cost?

Mr. HOGAN. Fiscal year 1980, \$100,000.

Mrs. HOLT. So we are tripling—

Mr. HOGAN. Their budget this year—I think maybe you've got that in front of you, Mrs. Holt.

Mrs. HOLT. I think we are going to run into trouble with it because we just knocked \$1 billion out of the foreign aid bill, and the climate is that nothing should be increased in cost. I guess the retirement won't really add to the cost immediately.

Mr. HOGAN. No; it won't. Not until the out years, Mrs. Holt. The costs you have in front of you mention the retirement matter. It is basically the cost for the two new judges and the increased administrative costs.

Mr. WHITE. Let's read it section by section. Let's just go through the language itself. I think that would be the most suitable way to go through it.

Mr. HOGAN. Under (a), this 70-year retirement—

Mr. WHITE. No; I want you to read the language.

Mr. HOGAN [reading]:

A judge of the Court of Military Appeals who attains the age of 70 shall be retired upon attaining such age.

A judge of the Court of Military Appeals who has attained the age of 65 may retire at any time after serving as a judge for 15 years or more.

Mr. WHITE. Hold it. Is there any question about that?

[No response.]

Mr. WHITE. OK. Go ahead, sir.

Mr. HOGAN [reading]:

A judge of the Court of Military Appeals who is not reappointed following the expiration of such judge's term of office may retire upon the completion of such term if—

The judge has served as a judge of the Court of Military Appeals for 15 years or more; and not earlier than 9 months preceding the date of the expiration of such term of office and not later than 6 months preceding such date, the judge advised the President in writing that the judge was willing to accept reappointment of the court.

Mr. WHITE. OK, let's hold it there. Any questions about that?

[No response.]

Mr. WHITE. Does Counsel have any questions about that?

Mr. HOGAN. No, sir.

Mr. WHITE. OK, go ahead.

Mr. HOGAN [reading]:

A judge of the Court of Military Appeals who becomes permanently disabled from performing judicial duties under this chapter shall be retired.

Mr. WHITE. Let me ask—suppose the judge is not reappointed, has his 15 years, but he's not 65, and then he has not given his notice, within this 9- and 6-month period. After he reaches 65, can he apply for retirement?

Mr. HOGAN. You are saying he has not given his notice, he is just not reappointed.

Mr. WHITE. He's not reappointed, he has not given his notice, but he's put in a full 15 years.

Mr. HOGAN. At the age of 65, he can—

Mr. WHITE. Suppose he's 64½ and he's looking forward to retirement, but he's afraid to get reappointed again because he'll go forever.

Mr. EFFRON. The provisions of the bill—if there's a problem of disability, that would take care of that, but—

Mr. WHITE. No, that's—

Mr. EFFRON. If the question were that the individual was not willing to be reappointed and is under the age of 65, fails to put in that notice, then the judge would not qualify.

Mr. WHITE. For any kind of retirement.

Mr. HOGAN. Could qualify for civil service.

Mr. EFFRON. He could qualify for civil service retirement in terms of—

Mr. WHITE. But he hasn't made any contribution.

Mr. EFFRON. There would have to be a contribution for the years in which the individual would—

Mr. WHITE. Where is that in the bill?

Mr. EFFRON. That is a general provision in the bill that the provisions of the civil service retirement—I think this is an incorporation of subsection (g) of section 7447 of the Internal Revenue Code. That's on page 14, line 4. Excuse me, page 14, line 14. This incorporates that provision of the Tax Court's retirement scheme which states that the provisions of the civil service laws that are not inconsistent with this law apply to judges of the court. So if a judge does not come under the retirement scheme of the court, then the judge is under civil service retirement, and under civil service retirement, you get credit for each year for which you either make a contribution during that year or for which you later make a contribution equivalent to the contribution you would have made.

Mr. WHITE. Before leaving the service.

Mr. EFFRON. Before leaving the service an individual would have to make that decision, so that a judge, let's say, for some reason got into the position of being age 64 and did not want to serve further, but did not want to lose the retirement, then he would be in a position to make the contribution.

I would also add that if judges perceive this to be a problem and did not want to be in a position of later on making the large contribution, they can have the withholding from their pay taken care of while they are in the service as a judge. They do not have to elect to be in the Tax Court's retirement program until prior to their retirement, at which point they would be able to recover the contribution they have previously made to the civil service fund.

Mr. WHITE. What will happen under that kind of a system—it may be in the system now, I don't recall, but under that kind of system, you are going to see judges who will automatically give their notice and then get reappointed. If they are not reappointed, then they've got it made. If they are reappointed, then they will wait the year or whatever time it is until they reach 65 and then they'll resign and draw.

Mr. EFFRON. With 15 years—

Mr. WHITE. With 15 years.

Mr. EFFRON. With a minimum of 15 years of service on the court.

Mr. WHITE. Which is just as disruptive almost as what we've got now.

Mr. EFFRON. One would expect that the operation of the retirement scheme would be taken into account in terms of the experience that the Tax Court has had. The Tax Court has not found themselves

to be in the situation where people are concerned about the requirement to give notice when reaching the age of retirement.

One thing that they can do in this circumstance is that the judge could give—if the judge wishes to continue serving, and we wish to have the continued service of the judge, the judge can give the notice, retire, then be recalled to active service. That way, the retirement is preserved as well as having the ability to use that judge until a permanent appointee is found.

Mr. WHITE. Wouldn't you have a little more orderly retirement system if he had a vested right after 15 years? Then he wouldn't try to get another term, especially if he was right there on the threshold of being 65. Say, he was 62 or 63, go ahead and retire so you wouldn't have—they could go ahead and appoint another judge.

Mr. EFFRON. Yes, sir, you could remove that portion. You could serve that goal by removing the notice requirement in subdivision (3). One reason you might want to consider not doing that is that the provisions you have talked about—the circumstances you have talked about—are likely to occur when an individual is in the lower sixties, which means that the individual was appointed, let's say, between age—

Mr. WHITE. Age 46.

Mr. EFFRON. Ages 45 and 50. If judges were appointed who were younger—and judges have been appointed who are younger—to the Federal bench in their early forties, you would then have a term expiring at age 55, at a time when he could continue to provide very good service to the court, and yet you would have them be in a situation where they would not even have to signify a willingness to be reappointed.

Again, it's really a choice for the committee to make in terms of which age groups it feels that it needs to address most specifically with respect to the retirement. I don't think it makes a great deal of difference to the attractiveness of the retirement system, but it will make some difference in terms of how it's operating with differing age groups who become eligible at different times.

Mr. WHITE. What about Federal judges who have, say, 15 years in, and who retire before they are 60. If they retire at 64, do they have any vested interest in their retirement? Do they have to be in service when they retire?

Mr. EFFRON. I do not believe that they have any, because it's a non-contributory system. They may be able to coordinate the civil service, but I can't answer that for sure.

Mrs. HOLT. Mr. Chairman?

Mr. WHITE. Yes?

Mrs. HOLT. Why are we doing this? Why are we increasing this retirement? You know, right now, serving on the Budget Committee, I am just so aware of all the entitlements that we have created and we can't do anything about them. And if you look here and compare the civil service and the Tax Court model, and under one condition, the judge would receive \$18,500, under this one, \$57,500. It just goes right down the line like that.

Why are we doing it? At whose request? I'm talking about this part of it. I know the other parts of it.

Mr. HOGAN. Well, Mrs. Holt, I have looked this over myself for a number of years. I think I mentioned, going back some years, I had personal familiarity practicing in that court.

Mrs. HOLT. Is it at your request?

Mr. HOGAN. It was not solely at my request. It was in the original Defense bill.

Mrs. HOLT. But it looks like an incentive to attract judges, and if I have any knowledge of it, we have them lined up begging us to appoint them.

Mr. HOGAN. Well, we have had a number of judges on that court, Mrs. Holt, who have left the court who otherwise would have stayed, to go to the Federal bench to accept an appointment, or who have left the court to go out into civilian life. One reason was they were dissatisfied with the retirement plan.

Mrs. HOLT. But we didn't have any trouble replacing them, though, did we?

Mr. HOGAN. We have people just like that coming in again. We have Judge Perry who just left. We had one individual who was one of the young people Mr. Efron was talking about who was on the court for 3 or 4 years and left while he was in his early fifties. We've had a previous judge leave to take another appointment. It's been this constant turnover, and I would guess—I couldn't vouch for it—I know in one instance and would guess in the other that one of the attractive features of going to another court was to get into a better retirement plan.

I don't want to get into names, but I have talked to individuals, and others have, who would be otherwise interested in the court if the retirement plan was better.

Mrs. HOLT. We've just got so many places for our money to go, and I am just feeling it so urgently now, and if we are attracting good quality people and even though they are leaving we get other good quality people to fill the job, I—

Mr. HOGAN. Well, it's a terrible thing to have somebody on the court continuously for 2 years and leave, and somebody else for 2 years and leave. It's a deterioration—

Mrs. HOLT. Why is it terrible?

Mr. HOGAN. Well, the continuity, the—

Mrs. HOLT. I think it might be kind of healthy.

Mr. HOGAN. Well, the results haven't been that way, Mrs. Holt. There have been a variety of problems of the movements.

Mrs. HOLT. Well, I think it's dangerous to try to increase anything at this point. I'll be quiet now.

Mr. WHITE. No. I think that's useful. That's what we're trying to find out.

Where are we at this point?

Well, on your example, you had a judge receiving retirement pay of \$57,500. In other words, if he had been in 15 years and the President does not reappoint him, and he's given his proper notice, then he would retire at \$57,500. I presume he could be 55 and retire at \$57,500.

Mr. HOGAN. The point that Kim Wincup just made, Mrs. Holt, was—in connection with your comment and the Congressional Budget Office saying—that the extra cost of the retirement is not going to be felt for

a number of years, and then it's going to be relatively modest, something on the order of averaging out—what was it? Age 40—

Mrs. HOLT. Yes; I read this in here.

Mr. WHITE. Well, it seems to me that if a man is near the end of his term, he can put his notice in and hope that the President doesn't reappoint him. It would be to his best advantage. Am I correct on that? If he stays in active service, he receives just about the same pay as if he retired.

Mr. HOGAN. The same retirement. You say 65 to go to 70, is that the point you mean?

Mr. WHITE. Well, why would he want to remain on the bench to receive the same amount of money that he would get if he retired?

Mr. HOGAN. The only problem I have there, if you listen to the sitting judges in the Federal system, they are extremely reluctant to retire at all.

Mr. WHITE. But in terms of money, they can go out in private industry and just practice law. They've got their retirement after 15 years and they are in pretty good shape. Aren't they going to make the same amount in retirement as they are on the bench? If I read this correctly.

Mr. HOGAN. That's correct. I suppose it's the point of view that the individual takes being a Federal judge—active Federal judge—as to what he wants to do. We have seen many of them who, in the Federal system, could have retired at 65 and stay on until they're 70 and they have to drag them out when they're 70.

Mr. WHITE. Sure, but when they get to be 65, there are not that many opportunities outside and they are not that eager to go out and fight the day through court, that is, on the trial end, but when you are young, as some of these people could be, then they would have the best of both worlds without having made any contribution whatever.

Mr. HOGAN. Well, I don't know how many of them they are going to be appointing at a relatively youthful age, so I guess there's not much I can say about that, Mr. Chairman. I guess it's the point of view that the individual has. I can't comment any further on that.

Mr. WHITE. I wonder, since the hour is late and a lot of our people aren't here, whether we shouldn't stop at this point. Let's look at this a little further. I think it would be well to advise the membership of the committee just where we are and give them the whole picture of it. Maybe we'll see it in a better light on another day.

While I can see one end of it, I can see the objective of attracting people, because they are afraid if they go in for 15 years they will have lost their contacts and if the President doesn't reappoint them then, indeed, they are out.

On the other hand, I also see where it's to the advantage of a man not to get reappointed. If he goes through the mechanism of giving his notice, then he's got a pretty good situation. If I were in his position, I think I would be happy if I weren't reappointed, providing I gave my notice.

Mr. HOGAN. Well, I suppose that's providing you were appointed when you were 40 years old, but I'm not so sure how many people of the bench—

Mr. WHITE. Well, at any age, as long as you are—if you are in your early sixties or below, you are still in a position to start a second career. That's what I'm saying. And still have you full retirement, earning

the same amount of money as if you sat—earning more, really, because you would have your outside income, but earning, judgewise, the same amount of money as if you were sitting on the bench every day, without having put a dime into the system.

That's the position I have.

Mr. HOGAN. Well, the only thing I can say, Mr. Chairman, that's the Federal system and—

Mr. WHITE. It's not the Federal judge's system, though. The Federal judge's system is you have to be 65 before you can retire.

Mr. HOGAN. Well, I'm talking about the Tax Court.

Mrs. HOLT. Mr. Chairman, I think you are making a good point to change some of these other systems.

Mr. WHITE. Mr. Won Pat, do you wish to proceed, or should we just go ahead and adjourn at this point, subject to the call of the Chair? I think we are at a point when I think we all ought to look at it a little more.

Mr. WON PAT. I suggest that we recess, subject to the call of the Chair.

Mr. WHITE. Without objection, the Chair is going to declare this committee adjourned for the day, adjourned subject to the call of the Chair on H.R. 6406. I think we need to talk more about this.

I do appreciate your coming up.

Mr. EFFRON. Thank you very much. We will be available for any information you would like.

[Whereupon, at 3:40 p.m., the subcommittee adjourned, subject to call of the Chair.]

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HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
MILITARY PERSONNEL SUBCOMMITTEE,

Washington, D.C., Tuesday, September 23, 1980.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2212, Rayburn House Office Building, Hon. Richard C. White (chairman of the subcommittee) presiding.

Mr. WHITE. Good morning.

Today, the Military Personnel Subcommittee will markup legislation concerning the Court of Military Appeals.

As you recall, we held hearings on the subject and have had two previous markup sessions. The issue which has delayed this legislation relates to establishing a new retirement program for the judges. Since no resolution of that point seems feasible this session, I propose that we act on the legislation as originally proposed by the administration, with the amendments approved by the subcommittee to date. A draft of the legislation is before each of the members.

As you recall, the principal provisions of the administration proposal are:

To clarify the independent status of the court;

To increase the number of judges from three to five; and

To authorize Supreme Court review of Court of Military Appeals cases by discretionary writs of certiorari;

The subcommittee has added several changes to this proposal, most of them technical in nature. The substantive changes are to:

Require that no more than three judges of the court may be appointed from the same political party;

Provide for notification to the appellate counsel of the accused, as well as the accused himself, before the time for appeal begins to run;

Include the judges of the court in the financial disclosure provisions of the Ethics in Government Act of 1978; and

Alter the mandatory retirement age of 70 proposed for the judges to a permissive retirement at age 70.

I have received strong recommendations that this legislation should be enacted this year from officials of the Department of Defense as a whole and, particularly, the Judge Advocate Generals of each of the services. Without the retirement provision—a matter which should be addressed on a uniform basis with all other article I Federal courts—this bill is not likely to be controversial and could be passed quickly.

The draft legislation is before each member for discussion or an appropriate motion.

We had counsel redraft what is known as a clean bill, so we can go ahead and act on this measure.

The Chair lays out before the committee the revised bill which has no number at the present, which is a redraft of H.R. 6406, without the retirement provision.

The Chair will go through each section. The Chair's own motion will be open for amendment at any point. I will go through each section and ask if there are any amendments. The short title—this Court of Military Appeals Act of 1980, and the subsection 1(b), as you read it yourself, determines whether you have any amendments to—

Mrs. HOLT. Mr. Chairman?

Mr. WHITE. Yes.

Mrs. HOLT. I think we are all familiar with this. I am not aware of any amendments that anyone has proposed.

I think that the provision that was giving some of the members trouble, certainly gave me trouble, was the retirement and that we are going to have to spend some time working on that, but I would propose, if there are no amendments, that we adopt this legislation.

Mr. WHITE. I second the motion. It's been moved and seconded that the instant bill before us be adopted as the bill of the subcommittee to be introduced and recommended to the full committee for passage. We will call the roll.

Off the record.

[Discussion off the record.]

Mr. WHITE. On the record.

Well, with the unanimous consent of the committee, the Chair revises his earlier announcement.

I'm advised by the counsel that this bill can be taken by voice vote. Unless there is a motion on the part of one of the members of the committee present, the Chair will then lay before the committee the question by voice vote.

All in favor of passage of the instant bill to be introduced and submitted to the full committee with recommendation that it be passed say aye.

[Chorus of "Aye's."]

Mr. WHITE. All opposed signify by saying no.

[No response.]

Mr. WHITE. The Chair, having heard only aye's, declares that the aye's have it, and the bill is adopted and recommended to the full committee for passage.

Is there any further business before the committee at this time?

Mr. WINCUP. I just might mention that you might try, if possible, to bring this up to the full committee on Thursday. It is not the normal 3-day notice, but it is not basically a controversial bill.

The other option would be to consider the possibility that the Senate Judiciary Committee may attach it to a bill that basically belongs to the House Judiciary Committee, but they will accept it and advise of the exact provisions that the House would endorse.

Mr. WHITE. Well, you can advise the Senate subcommittee of our action, and we will ask unanimous consent.

Do we need unanimous consent before the full committee to bring it up before the full notice has been given to the full committee?

Mr. WINCUP. I'd think you'd have to get it.

Mr. WHITE. All right. We will ask for unanimous consent and try to bring it up at that time.

Is this a business meeting on next Thursday?

Mr. WINCUP. Yes, sir, it is. That attached provision comes up.

Mr. WHITE. Then we will make that motion at that time and hope that we can pass it.

The staff will prepare this measure for my signature and introduction today.

Mrs. Holt, if you wish to be a cosponsor and check with the other subcommittee members to see who would like to cosponsor. There being no further business, the subcommittee is adjourned.

[Whereupon, at 10:10 a.m., the subcommittee was adjourned.]

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